

DEPARTURES



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Departures Overview and Case Law Summary

Introduction

Since the *Koon*¹ decision of 1996 departure policies have extended to district courts greater flexibility in determining the appropriate sentencing in cases that differ from the “heartland” of cases involving federal crimes. The interplay of statutes, guideline provisions, and case law has largely defined the parameters within which courts can exercise their judicial discretion in making departure decisions.

While statutory directives have extended to courts the authority to depart in cases involving aggravating or mitigating factors which take such cases outside of the “heartland,” guideline provisions have identified certain factors the Sentencing Commission has adopted as forbidden, encouraged, discouraged or unmentioned grounds for departure. The Commission’s position on forbidden and encouraged factors is relatively clear. Factors discouraged by the Commission have been identified by courts as a valid basis for departure only if present to an “extraordinary” or “exceptional” degree. Most case law departure decisions however have addressed factors unmentioned by the Commission.

I. Statutory Authority for Departures

A. 18 U.S.C. § 3553

Although the Sentencing Reform Act of 1984 requires that a district court impose a sentence within the applicable guideline range in an ordinary case (18 U.S.C. § 3553(a)), it does not eliminate all of the district court’s traditional sentencing discretion. Rather, it allows a departure from the guideline range if the court finds “there exists an aggravating or mitigating circumstance of a kind, or to a degree not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described” (18 U.S.C. § 3553(b)), or when the guideline otherwise specifically provide for a departure.²

¹518 U.S. 81 (1996).

²This document does not discuss departures under USSG §5K1.1, or sentencing below the mandatory minimum under, 18 U.S.C. § 3553(e), for substantial assistance upon motion from the government.

B. 18 U.S.C. § 3742(a), (b)

Before the guidelines system was instituted, a federal criminal sentence within the statutory limit generally was not reviewable on appeal.³ The Sentencing Reform Act of 1984 altered this scheme in favor of limited appellate jurisdiction to review federal sentences. Among other options, it allows a defendant to appeal an upward departure, and the government to appeal a downward departure.

II. Guideline Provisions

Under §5K2.0 of the U.S. Sentencing Guidelines, the Commission granted broad departure authority to district courts by adopting the language of Title 18 U.S. Code § 3553(b) which provides that a court is permitted to depart from a guideline-specified sentence only when it finds “an aggravating or mitigating circumstances of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.” With this provision the district courts have had discretionary power to determine whether, and to what extent, departures were warranted.

This discretionary power is limited, only to a certain degree, by departure factors enumerated in the guidelines that courts rely upon in making their determinations. For example, forbidden departure factors are: Section 5H1.10 (Race, Sex National Origin, Creed Religion, and Socio-Economic Status) §5H1.12 (Lack of Guidance as a Youth and Similar Circumstances), the third sentence of §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse, and the last sentence of §5K2.12 (Coercion and Duress). Chapter Five, Part K, lists factors that the Commission has identified as encouraged factors that may constitute grounds for departure but considers this list as non-exhaustive. The Commission also has determined certain discouraged factors as grounds for departure, although relevant in “extraordinary” or “exceptional” cases: Section 5H1.1 (Age), §5H1.2 (Education and Vocational Skills), §5H1.3 (Mental and Emotional Conditions), §5H1.4 (Physical Condition, Including Drug and Alcohol Dependence or Abuse), §5H1.5 (Employment Record); §5H1.6 (Family Ties and Responsibilities and Community Ties), §5H1.11 (Military, Civic, Charitable, or Public Service; Employee-Related Contributions; Record of Prior Good Works), and §5H1.12 (Lack of Guidance as a Youth and Similar Circumstances).

Other specific commentary within selected guideline provisions and issues regarding adequacy of criminal history also provide grounds for guideline departures.

³*Dorszynski v. United States*, 418 U.S. 424 (1974) (reiterating the general proposition that once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end).

III. Post-*Koon* Appellate Court Departure Decisions

The discretionary power of district courts was broadened further by the 1996 *Koon* decision. Although *Koon* established a new “abuse of discretion” standard of review to be applied in assessing district court departure decisions, *Koon* permitted certain key issues to remain intact that were considered *not* to be subject to a deferential standard: (1) Whether the factor being considered has taken the case outside the heartland; (2) whether the Sentencing Commission has already taken into account the factors the sentencing court identified as a basis for departure; and (3) whether or not there was an abuse of discretion exercised by the district court.

As the appellate courts continued to apply the *Koon* analysis, and considered the relevant guideline provisions when applicable, district court departure decisions have been reversed, affirmed, and, in some cases upheld for *refusing to depart* upward or downward based on various factors.

A. FACTORS *NOT* CONSIDERED OUTSIDE THE “HEARTLAND” OF A GUIDELINE

The Commission intends the sentencing courts to treat each guideline as carving out a “heartland,” a set of typical cases embodying the conduct that each guideline describes.⁴ When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted.⁵ In *Koon*, the Supreme Court specifically held that the determination of whether a factor takes a case outside the heartland is not made “as a general proposition.”⁶ Rather, the sentencing court must consider whether the “particular factor is within the heartland given all the facts of the case.”⁷ Descriptions of cases in which courts have addressed this issue appear below:

- ***Non-Commission of Additional or Worse Offense Does Not Take Case Outside the “Heartland.”*** *United States v. Grosenheider*, 200 F.3d 321 (5th Cir. 2000), held that the defendant’s history of not abusing any child, and of not having an inclination, predisposition or tendency to do so, and the fact that the defendant had not produced or distributed child pornography, with no inclination, predisposition, or tendency to do so, did not suffice to take the defendant’s case out of the “heartland” of §2G2.4. **Consistent with the Second, Eighth, and Ninth Circuits**, the court stated that the guidelines had taken into account the varying degrees of the severity of offenses involving possession of child pornography as compared to more serious forms of exploitation. The court agreed with its sister circuits that a defendant is not entitled to downward departure outside of the “heartland” because the defendant did not commit an

⁴USSG Ch. 1, Pt. A(4)(b), Introductory Comment.

⁵*Id.*

⁶*Koon* at 98.

⁷*Id.* at 99-100.

additional or worse crime. The court held that the guidelines clearly reflect in §§2G.2.1-2G2.4 consideration of whether, and the degree to which, harm to minors is or has been involved.

- ***Standard of Comparison for Determining if Case is Outside the “Heartland.”*** *United States v. Stevens*, 197 F.3d 1263, 1268-70 (**9th Cir.** 1999), held that the determination of whether the defendant’s conduct fell within the heartland of the guideline for possession of child pornography required a comparison of the defendant’s conduct with that of other offenders. The court further supported this established standard for determining the “heartland” by noting that it previously made clear, in *United States v. Sanchez-Rodriguez*, 161 F.3d 556, 561 (**9th Cir.** 1998) (en banc), that a district court should compare the defendant’s conduct with the conduct of all defendants who are sentenced under the same guideline. The **Ninth Circuit** disregarded the approach used by the district court of defining the “heartland” of §2G2.4 by comparing the defendant’s conduct to harms originally intended by Congress as prohibited and governed, for sentencing purposes, by §2G2.4. The court reasoned that the defendant’s substantial number of “old” images of child pornography was typical of heartland cases under §2G2.4. The court examined other grounds for departure raised by the defendant such as lack of additional wrongful conduct and use of a computer in commission of the offense. Consistent with the **Second and Eighth Circuits**, the court held that the defendant’s failure to engage in additional wrongful conduct is impermissible as a grounds for departure when sentencing for crime of possession of child pornography. The court further held that the use of a computer is equally inappropriate to prove the defendant as less culpable when the same factor is provided as a sentencing *enhancement* under §2G2.4.
- ***Cultural Differences.*** *United States v. Tomono*, 143 F.3d 1401, 1404 (**11th Cir.** 1998), held that the district court erred in departing downward based on “cultural differences” arising from the defendant’s illegal importation of turtles and snakes from Japan. The court noted that the defendant was aware of the United States regulations forbidding the importation of reptiles, and yet, with this understanding, falsely completed the Customs forms to indicate that the defendant was not bringing into the United States any more live animals. The court found that since §2Q2.1 of the guidelines, under which the defendant was sentenced, specifically applied to crimes involving the illegal importation and exportation of wildlife, by definition imported wild comes from other countries. The court examined the record of evidence and held: (1) Reptiles do not occupy a “unique” place in Japanese culture so as to warrant a downward departure for cultural differences; and (2) The circumstances surrounding the defendant’s crime were not very different from the “heartland” of cases considered by the Sentencing Commission in drafting §2Q2.1.
- ***Increase in Guideline Range Due to Application of Cross-Reference.*** *United States v. Fenner*, 147 F.3d 360, 363-364 (**4th Cir.** 1998), *cert. denied*, 119 S.Ct. 568 (1998), reversed a downward departure based on a significant increase in sentencing guideline ranges due to the application of a cross-reference provision that applies to firearms offenses resulting death. Such factor did not take the case outside the “heartland” of cases under §2K2.1. The court noted that the enhancement resulting from an application of §2K2.1(c)(1)(B) cross-

reference has not been identified by the Commission in the guidelines, policy statements, or commentary, as a forbidden, encouraged, or discouraged basis for departure, thus it must be considered an unmentioned factor. In analyzing unmentioned factors, the court determined that must consider whether enhancement resulting from the application of the cross-reference is taken into account within the “heartland” of the applicable guidelines. The court further noted that §2K2.1 was written by the Commission to address the heartland of a wide variety of firearm possession and transportation offenses. The court finally held that the language of the cross-reference plainly indicated that when a firearm is illegally possessed in connection with another offense in which death results, the sentencing court must enhance the defendant’s sentence in accordance with the homicide guidelines if that sentence is greater than that calculated without reference to the homicide guidelines. This language indicated that the guidelines had taken into account that application of §2K2.1(c)(1)(B) cross-reference will result in an enhanced guideline range and consequently does not take the case outside of the “heartland.”

- ***Governmental Misconduct.*** *United States v. Santoyo*, 146 F. 3d. 519, 525-526 (7th Cir. 1998), *cert. denied*, 119 S. Ct. 1085 (1999), held that the defendant’s case cannot be taken outside the heartland of drug offenses based on allegations that government’s confidential informants “cajoled” the defendant into introducing them to a cocaine supplier. The defendant brokered a deal between confidential informants (CI) and the defendant’s cocaine supplier for monetary compensation after a few discussions of the amount of cocaine to be delivered to the government’s CI. The defendant offered no additional evidence to support government’s efforts to cajole such as how, when and where the agents cajoled the defendant or the tactics used by the government to persuade the defendant to commit this crime. Instead, the government claimed the defendant frequently bragged about his connections to cocaine dealers and his ability to broker deals. The court affirmed that the extent of the alleged “cajoling” was not so unique as to remove this case from the heartland of drug offenses.
- ***Impulse Control Disorder.*** *United States v. Miller*, 146 F.3d. 1281, 1285-1286 (11th Cir. 1998), held that the defendant’s impulse control disorder did not take case outside the heartland of cases involving sexual exploitation of minors. The court noted from evidence available that it was not unusual for those who collected child pornography, whether pedophiles or not, to have impulse control disorders. The defendant’s impulse control disorder was related to viewing adult pornography and acting out sexually with adults. The impulse was related to viewing pornography but was not related to the *means* of obtaining the pornography (*i.e.*, trading of child pornography via the Internet). The defendant used the pornographic pictures of children to solicit the kind of pictures of interest to the defendant. Because there was nothing unusual about the defendant or the facts of this case, the court affirmed that the case fell within the heartland of a case regulated by the sentencing guideline.

B. FORBIDDEN FACTORS

The Commission has listed forbidden departure factors that courts cannot take into account as grounds for departure: Section 5H1.10 (Race, Sex National Origin, Creed Religion, and Socio-Economic Status), §5H1.12 (Lack of Guidance as a Youth and Similar Circumstances), the third sentence of §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse, and the last sentence of §5K2.12 (Coercion and Duress).

In Addition to the Commission's List of Forbidden Factors, Courts Have Held Other Factors to Be INVALID as a Basis for Departure⁸:

- **Adverse Civil Judgment.** *United States v. Pennington*, 168 F.3d 1060 (8th Cir. 1999), upheld the district court's refusal to depart downward based on the fraud victim's receipt of a \$6,000,000 judgment in its civil fraud action against the defendant for the conduct at issue in the criminal case. The court concluded that an adverse judgment in a prior civil case involving the same fraudulent conduct is not a permissible basis to reduce the prison sentence for the criminal fraud. The court distinguished the adverse civil judgment against the defendant from the substantial, voluntary restitution that was held to be a permissible basis for downward departure in *United States v. Garlich*, 951 F.2d 161, 163 (8th Cir. 1991). It is entirely foreseeable that fraud victims will seek to recover their damages in civil actions against fraud perpetrators; thus an adverse civil judgment does not warrant a downward departure because it does not take a fraud case out of the heartland of §2F1.1.
- **Defendant's Mistake of Fact.** *United States v. Rodriguez-Ochoa*, 169 F.3d 529 (8th Cir. 1999), upheld the district court's refusal to depart downward based on the defendants' mistake of fact where they contended they believed they were transporting a different type of drug. The court of appeals held that the guidelines explicitly consider the effect of a drug defendant's mistake of fact on his or her sentencing accountability in §1B1.3, comment. (n.2(a)(1)), and the district court could not depart on that basis.
- **Sentencing Disparity.** *United States v. Contreras*, 180 F.3d 1204 (10th Cir.), cert. denied, 120 S. Ct. 243 (1999), reversed a downward departure based on sentencing disparity between codefendants. Disparity in sentencing is considered an impermissible departure factor when defendants, being compared, either: (1) pled to or were convicted of different offenses; or, (2) played significantly different roles in the Commission of the same offense. The court noted that the guidelines were not designed to eliminate all sentencing disparities, but only to eliminate "unwarranted" disparities. *United States v. Snyder*, 136 F.3d 65 (1st Cir. 1998), and *United States v. Searcy*, 132 F.3d 1421 (11th Cir. 1998), held that disparity between federal and state sentencing is a forbidden departure factor. Prior to *Koon*, other circuits had

⁸These departure factors should not be viewed as factors **forbidden** by the courts of appeals but merely factors considered as invalid bases for departure in a given set of facts.

reached the same conclusion. *See, e.g., United States v. Haynes*, 985 F.2d 65, 69-70 (**2d Cir.** 1993); *United States v. Deitz*, 991 F.2d 443, 447-48 (**8th Cir.** 1993); *United States v. Sitton*, 968 F.2d 947, 962 (**9th Cir.** 1992), and 507 U.S. 929 (1993); and *United States v. Dockery*, 965 F.2d 1112, 1117-18 (**D.C. Cir.** 1992). *United States v. Willis*, 139 F.3d 811 (**11th Cir.** 1998), *rehearing denied*, 156 F.3d 188 (1998), noted that permitting departure based on the disparity with a codefendant's state court sentence would create system-wide disparities among federal sentences.

- ***Substantial Assistance in the Absence of Government Motion.*** *United States v. Solis*, 169 F.3d 224 (**5th Cir.** 1999), reversed the downward departure that was based on the defendant's substantial assistance where the government files no motion. The court held that §5K2.0 does not afford district courts any additional authority to consider substantial assistance departures without a Government motion. *United States v. Abuhouran*, 161 F.3d 206 (**3d Cir.** 1998), *cert. denied*, 119 S. Ct. 1479 (1999), held that the district court does not have the authority, under §5K2.0, to grant a downward departure based on the defendant's substantial assistance in the absence of a government motion under §5K1.1. Whether the government makes a motion cannot be considered an unmentioned sentencing factor. An "unmentioned factor" is a factor which has no semantic or practical equivalent or substitute in the guidelines and no mentioned factor encompasses it.

S *United States v. Cruz-Guerrero*, 194 F.3d 1029, 1031 (**9th Cir.** 1999) reversed the downward departure that was based on substantial assistance to the government where the government had not moved for such departure. The court relied on the governing guideline regarding departures for substantial assistance, §5K1.1. Section 5K1.1 requires a motion to be filed by the government for consideration of the defendant's substantial assistance. The court reinforced its interpretation of §5K1.1 to mean that, in the absence of arbitrariness or unconstitutional motivation on the part of the government a district court may not depart downward from the guidelines for substantial assistance unless the government moved for such a departure.

NOTE: In contrast, where courts have granted the government's motion to depart below the statutorily required minimum because of defendant's substantial assistance, the starting point for calculating the departure is the statutory minimum.

S *United States v. Pillow*, 191 F.3d 403, 404 (**4th Cir.** 1999), held that the starting point for calculating downward departures below the statutory minimum for defendant's substantial assistance is the statutory minimum. The defendant was convicted of conspiracy to possess with intent to distribute methamphetamine. Although the defendant's guideline range was 188 to 235 months he was subject to a statutorily required minimum sentence of 240 months. The district court found that, pursuant to §5G1.1(b), the defendant's statutorily required minimum sentence of 240 months became the defendant's guideline sentence since it was greater than the defendant's applicable guideline range. The government filed motions with the district court for

downward departures from the statutory minimum under 18 U.S.C. § 3553(e) and from the guideline sentence under §5K1.1 of the sentencing guidelines and both motions were granted. The district court used the 240 months as the starting point for calculating the extent of both downward departures. The **Fourth Circuit** affirmed and concluded that §3553(e) allows for a departure from, *not the removal of*, a statutorily required minimum sentence, thus defendant remains subject to a statutorily required minimum sentence. *See also United States v. Head*, 178 F.3d 1205, 1206 (**11th Cir.** 1999), (held that the mandatory minimum represents the appropriate point of a downward departure for defendant's substantial assistance even though the guideline applicable to defendant produces an alternative guideline range).

- ***Combination of Factors When Each Factor Independently Would Not Justify a Departure.*** *United States v. Debeir*, 186 F.3d 561 (**4th Cir.** 1999), reversed a downward departure that was based on a combination of factors such as the defendant's unique psychological condition and unusual susceptibility to abuse in prison; the defendant's alien status and employment consequences; the defendant's exposure to negative publicity; the victimless nature of the defendant's offense; and the fact that the defendant was not a pedophile. The court found that neither individually, nor in combination, were the circumstances, characteristics or consequences of this case so unique or extraordinary to bring it outside the heartland of cases sentenced under the guidelines.
- ***Armed Career Criminal Status Overrepresents Seriousness of Criminal History.*** *United States v. Ruckers*, 171 F.3d 1359 (**11th Cir.**), *cert. denied*, 120 S. Ct. 426 (1999), reversed a downward departure made on the grounds that the defendant's prior convictions fell within the statutory definition of serious drug offenses but only involved small amounts of drugs and therefore were "very minor." The court noted that the defendant's prior state convictions for possession with intent to distribute cocaine constituted serious drug offenses within the meaning of 18 U.S.C. § 924(e)(2)(A)(ii) and, therefore, the defendant fell within the §4B1.4 Armed Career Offender Guideline. The court of appeals rejected the departure downward reasoning that a sentencing court may not look behind the facts of a prior conviction to conclude whether a downward departure is warranted on the grounds that the offense involved only a small amount of drugs and therefore was not serious.
- ***Extreme Childhood Abuse.*** *United States v. Rivera*, 192 F.3d 81 (**2d Cir.** 1999), reversed a downward departure that was based on extreme abuse suffered during childhood. The court noted that a departure downward may be granted only where abuse caused mental and emotional conditions that contributed to the defendant's commission of the offense.
- ***Defendant's Susceptibility to Abuse in Prison Because of Employment Status.*** *United States v. Winters*, 174 F.3d 478 (**5th Cir.** 1999), reversed a downward departure based on the defendant's susceptibility to abuse in prison due to the defendant's status as a corrections officer. The court noted that the defendant's mere status as an officer does not justify a departure and to allow such a departure would thwart the purpose and intent of the guidelines.

- The Sentencing Commission surely considered the possibility that some defendants convicted of violating a person's civil rights under color of law would be law enforcement officers.
- ***Susceptibility to Abuse in Prison Based on Nature of Defendant's Offense.*** *United States v. Wilke*, 156 F.3d 749 (7th Cir. 1998), reversed a downward departure for a defendant convicted of a child pornography offense. A court may not rely on the nature of the defendant's offense as a factor justifying such a departure, although the court could consider the defendant's sexual orientation and demeanor. *United States v. Kapitzke*, 130 F.3d 820 (8th Cir. 1997), held that the defendant's susceptibility to abuse in prison, based on his status as a child pornographer, could not be the basis for a downward departure, absent exceptional circumstances. Otherwise, every child pornographer would be eligible for a departure.
 - ***Consent to Deportation Without a Nonfrivolous Defense.*** *United States v. Marin-Castaneda*, 134 F.3d 551 (3d Cir.), cert. denied, 118 S. Ct. 1855 (1998), upheld a district court's decision that it lacked authority to depart based on the defendant's willingness to stipulate to deportation, his age, and the deterrent effect he experienced when hospitalized for ingesting the heroin he attempted to import. The court held that a defendant without a nonfrivolous defense to deportation presents no basis for downward departure by simply consenting to deportation, and a district court cannot depart downward on this basis without a request from the government.
 - ***Exemplary Behavior Pending Appeals.*** *United States v. Crouse*, 145 F.3d 786 (6th Cir. 1998), reversed district court's finding that the defendant's exemplary behavior during the pendency of appeals warranted a downward departure. The court noted that the defendant, convicted of interstate commerce shipment of adulterated orange juice, was granted downward departure because the defendant had "satisfactorily complied" with all the terms of home confinement and was a "model probationer." The court found that it is expected that a person sentenced to home confinement, or any other punishment, will "satisfactorily comply" with the terms of the sentence, or otherwise suffer the consequences of non-compliance. To reward the defendant for following the law is not a permissible grounds for departure.
 - ***Prior Conviction for Involuntary Manslaughter and Destruction of Vehicles.*** *United States v. G.L.*, 143 F.3d 1249 (9th Cir. 1998), reversed an upward departure based on the district court's concern that three auto thefts were overshadowed by the defendant's conviction for involuntary manslaughter. The court of appeals held that the correct course is a sentence in the upper regions of the guideline range rather than a departure. Also, the destruction of the vehicles was taken into account by the guidelines, since the loss figure is the same whether or not the stolen property is recovered.
 - ***Guideline Range is Too Harsh.*** *United States v. Webb*, 134 F.3d 403 (D.C. Cir. 1998), held that the district court's opinion that the guideline range is too harsh is not a permissible basis for departure. The defendant, who was a drug addict convicted of distribution of more than 50 grams of crack cocaine, received a downward departure on the grounds that the guidelines grossly overstated the offense level and was grossly disproportional to the crime. Because the

defendant's addiction does not remove this case from the "heartland" of crack distribution cases the district court must impose a sentence falling within the guideline range notwithstanding the personal opinion that the guideline range is disproportionate and unduly harsh.

- ***Harsher Penalties for Crack.*** *United States v. Banks*, 130 F.3d 621 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1400 (1998), found that harsher penalties for crack than for powder cocaine was not a permissible basis for departure. *United States v. McCloud*, 127 F.3d 1284 (10th Cir. 1997), found that harsher penalties for crack than for powder cocaine was not the sort of discrete, individual, and case-specific mitigating circumstance justifying downward departure.
- ***Government's Delay in Prosecuting.*** *United States v. Saldana*, 109 F.3d 100 (1st Cir. 1997), rejected the defendant's claim that the government's delay in prosecuting his illegal re-entry conviction was grounds for departure, where he argued that had the charge been brought earlier, his sentence could have run concurrently with a state conviction on another drug conviction.
- ***Defendant was not a Child Predator or Pedophile.*** *United States v. Wind*, 128 F.3d 1276 (8th Cir. 1997), rejected a downward departure based on the district court's finding that the defendant, convicted of possession and distribution of child pornography, was not a child predator or pedophile and had not committed more serious offenses. The defendant's lack of sexual tendencies toward children did not make his possession of child pornography significantly different from the normal case of child pornography possession.
- ***Civil Forfeiture and Defendant's Loss of Medical License.*** *United States v. Hoffer*, 129 F.3d 1196 (11th Cir. 1997), reversed a downward departure for the defendant's loss of his medical license and voluntary disgorgement of proceeds. The court noted that the defendant received a §3B1.3 enhancement for using his special skill and abusing the position of trust he held as a physician to facilitate the commission of his crimes. The abuse of such trust warrants loss of the position of trust and allowing a downward departure for the loss of the medical license would nullify the mandate of §3B1.1. The voluntary disgorgement was a civil forfeiture which can never be the basis for a downward departure because, under §5E1.1, the Commission viewed forfeiture as a wholly separate sanction in addition to imprisonment.
- ***Time Served for Defendant's Expired Sentence.*** *United States v. McHan*, 101 F.3d 1027 (4th Cir. 1996), *cert. denied*, 520 U.S. 1281 (1997), remanded a downward departure where the departure was based on time served for the defendant's expired sentence. According to the appellate court, a sentencing court cannot depart downward and reduce a defendant's sentence for drug conspiracy based on the time served for a prior drug conspiracy conviction despite the fact that prior conviction served as predicate conduct for the subsequent conviction. The court rejected departing when §5G1.3 does not give credit for a previously discharged related sentence, concluding that the Sentencing Commission did not leave unaddressed the question of whether a sentencing judge can give credit for discharged sentences, but rather consciously denied that authority.

- ***Exposure to Civil Forfeiture.*** *United States v. Weinberger*, 91 F.3d 642 (**4th Cir.** 1996), reversed a downward departure based on the defendant's exposure to civil forfeiture. According to the appellate court, the mandate of §5E1.4 (Forfeiture) means "that the Commission viewed monetary forfeiture as entirely distinct from the issue of imprisonment." Therefore, exposure to civil forfeiture was not a valid reason for departure under §5K2.0.
- ***Defendant's Lack of Criminal History.*** *United States v. Polanco*, 53 F.3d 893, 898 (**8th Cir.** 1995), *cert. denied*, 518 U.S. 1021 (1996), held that, because the guidelines adequately account for the absence of a criminal record, the defendant's lack of criminal history cannot remove a case from the heartland.

C. DISCOURAGED FACTORS

Based on Guideline Provisions

The Commission also has determined certain discouraged factors as grounds for departure, although relevant in "extraordinary" or "exceptional" cases: §5H1.1 (Age), §5H1.2 (Education and Vocational Skills), §5H1.3 (Mental and Emotional Conditions), §5H1.4 (Physical Condition, Including Drug and Alcohol Dependence or Abuse), §5H1.5 (Employment Record); §5H1.6 (Family Ties and Responsibilities and Community Ties), §5H1.11 (Military, Civic, Charitable, or Public Service; Employee-Related Contributions; Record of Prior Good Works), and §5H1.12 (Lack of Guidance as a Youth and Similar Circumstances).

- ***Age (§5H1.1).*** *United States v. Marin-Castaneda*, 134 F.3d 551 (**3d Cir.**), *cert. denied*, 118 S. Ct. 1855 (1998), upheld a district court's decision that it lacked authority to depart based in part on the defendant's age, 67, absent some extraordinary infirmity.
- ***Physical Condition, Including Drug or Alcohol Dependence or Abuse (§5H1.4).*** *United States v. Russell*, 156 F.3d 687 (**6th Cir.** 1998), held that the defendant's deafness did not qualify him for downward departure under the guidelines for extraordinary physical impairment where the defendant did not allege that prison services were inadequate to accommodate his disability or that he was not protected against attackers.

S ***Defendant's Drug Addiction.*** *United States v. Webb*, 134 F.3d 403 (**D.C. Cir.**), *on remand to* 1998 WL 93052 (1998), held that the defendant's drug addiction could not form a basis for downward departure. The district court identified the defendant's drug addiction as the "principal mitigating circumstance" that took the case outside the heartland of the guideline for drug distribution. The court, in applying the *Koon* analysis, stated that drug dependency or use was a *forbidden* departure under the guidelines and should not have been granted. The defendant pled guilty to distribution of more than 50 grams of crack cocaine in a single transaction, not to a small-time purchase or possession. That single transaction placed the defendant within the "heartland" of distribution cases for 50 grams of more of crack cocaine.

- ***Employment Record (§5H1.5).*** *United States v. Jones*, 158 F.3d 492 (10th Cir. 1998), upheld a downward departure based in part of the defendant's long-term work history in an economically depressed area with few employment opportunities as well as on the adverse impact incarceration would have on his future employment prospects, in light of the community which he lives. The court noted that the Supreme Court in *Koon* okayed consideration of collateral employment consequences. "A factor may be considered in the aggregate if it is 'atypical' even though it may not be sufficient, in and of itself, to support a departure.
- ***Family Ties and Responsibilities and Community Ties (§5H1.6).***
 - S ***Family Ties.*** *United States v. Sprei*, 145 F.3d 528 (2d Cir. 1998), overturned a family ties downward departure based on the unique responsibility the defendant, as a Hasidic Jew, bore for his children's marriages. The defendant's children's circumstances were not very different from the those of other defendants' children in that the stigma of their parent's punishment lessened their desirability as marriage partners. The court also noted the impropriety of treating adherents of one religious sect different from another. *United States v. Wilson*, 114 F.3d 429 (4th Cir. 1997), reversed a downward departure based on family ties. The appellate court concluded that the defendant's recognition of family responsibility, manifested partly by his decision to keep the out-of-wedlock baby he fathered, was not "sufficiently extraordinary" to support a downward departure.
 - S ***Family Circumstances.*** *United States v. Faria*, 161 F.3d 761 (2d Cir. 1998), vacated a downward departure based on family circumstances, holding that the hardship the defendant's incarceration would cause his children and ex-wife fell well short of what was required where, although the defendant paid child support, he no longer lived with his children, and his ex-wife earned approximately \$40,000 per year. *United States v. Archuleta*, 128 F.3d 1446 (10th Cir. 1997), rejected a downward departure for family circumstances where there was no one but the defendant to care for his two children and his diabetic mother; a defendant's status as a single parent is not an extraordinary family circumstance warranting departure and the record contained no information about the care his mother required.
 - S ***Extraordinary Family Circumstances.*** *United States v. Owens*, 145 F.3d 923 (7th Cir. 1998), held that it was not error to depart downward for extraordinary family circumstances where the defendant's common-law wife and children would have to go on public assistance; while the case was not the most compelling for departure, the court of appeals refused to second-guess the district court's decision.
 - S ***Inability to Pay Child Support.*** *United States v. Jones*, 158 F.3d 492 (10th Cir. 1998), held that a defendant's inability to pay child support to his estranged wife if imprisoned was not a permissible basis for departure.

- S** ***Hardship on the Defendant's Family.*** *United States v. Galante*, 111 F.3d 1029 (2d Cir.), *denial of reh'g en banc*, 128 F.3d 788 (2d Cir. 1997), affirmed a downward departure based on a finding that the hardship on the defendant's family caused by his incarceration would be exceptional. According to the appellate court, though the facts could have been construed differently, “we may not simply substitute our judgment for [that of the district] court.” On a denial of rehearing en banc, the court stated that the opinion was limited to its facts and should not be seen as an invitation to depart in the absence of exceptional family circumstances.
- ***Military, Civic, Charitable, or Public Service; Employment-Related Contributions; Record of Prior Good Works (§5H1.11).*** *United States v. Crouse*, 145 F.3d 786 (6th Cir. 1998), held that the defendant’s exceptional civic involvement was sufficient to take the case out of the heartland of white collar offenders.
- S** *United States v. Woods*, 159 F.3d 1132 (8th Cir. 1998), upheld a 1-level downward departure for the defendant’s extensive charitable activities; the defendant brought two troubled young women into her home, including a former employee who had stolen from her, and paid for them to attend private high school, and both women became productive members of society, and the defendant also assisted an elderly friend to move from a nursing home to apartment and helped care for him so that he could live out his remaining years with greater independence.

Discouraged Factors Based on Developing Case Law

- ***Number of False Documents.*** *United States v. Velez*, 168 F.3d 1137 (9th Cir. 1999), reversed an upward departure based on the number of false documents involved where the 1994 guidelines under which the defendant was sentenced provided for a fixed increase for “100 or more” documents. The court of appeals held that this language indicated that the Commission had considered situations in which the number of documents exceeded 100. By departing on this basis, the district court exceeded the maximum provided on the face of the guidelines. The court of appeals stated that the fact that application note 5, allowing departure on this basis, was later added does not change the analysis.
- ***Large Quantities of Drugs.*** *United States v. Warren*, 186 F.3d 358 (3d Cir. 1999), reversed an upward departure based on the large quantities of drugs involved in a simple possession case. In departing upward the district court relied in part on Application Note 1 to §2D2.1 which states “. . . Where the circumstances establish intended consumption by a person other than the defendant, an upward departure may be warranted.” The appellate court noted that large quantities of drugs are relevant to sentencing determinations in possession cases only to the extent that they indicate the high probability that the drugs were intended not for mere possession, but for distribution to others. Based on the evidence in the record the court found that the defendant did not intend that anyone consume the large quantities of drugs but only intended to turn those drugs over to government agents and did so. In such a situation the court

concluded that the district court abused its discretion in utilizing Application Note 1 of §2D2.1 §5K2.0 as a basis for an upward departure based on quantity of drugs.

- ***Unusually High Purity Level of Heroin.*** *United States v. Cones*, 195 F.3d 941 (7th Cir. 1999), reversed an upward departure based on the conversion of traditional street-level purities from 250 grams of 70 percent pure heroin. The court noted that statutes and guidelines allow conversion to a uniform purity for PCP and methamphetamine, and the guidelines now allow a conversion for LSD. For drugs other than LSD, PCP, and methamphetamine, the sentence must be calculated without an adjustment to a uniform purity level. The court found that the only function of Application Note 9 to §2D1.1 is to determine whether a higher sentence is appropriate only when purity is probative of the defendant's role or position in the chain of distribution. When higher purity implies a higher role in a criminal organization, departure should be limited to the number of levels that could be awarded under §3B1.1.
- ***Threat to National Security.*** *United States v. Nathan*, 188 F.3d 190 (3d Cir. 1999), held that an upward departure based on the defendant's actions as being a threat to national security was not warranted. The court noted that the district court's concern rested on the fact that the defendants shared information with the Ukraine that was not generally known and on its determination that this harm was not adequately captured by the monetary duties evaded by the defendants. There was not evidence in the record to show that confidential information was disclosed to Russia or the Ukraine by the defendants. The sentencing memorandum reflected that the defendants had taken affirmative action to prevent classified material from being disclosed. The court found that the district court clearly erred in finding that the defendant's conduct created a national security and abused its discretion in departing upward on that ground.
- ***"Extraordinary" Restitution.*** *United States v. Hairston*, 96 F.3d 102 (4th Cir. 1996), cert. denied, 117 S. Ct. 956 (1997), reversed a downward departure based on the defendant's "extraordinary" restitution. According to the appellate court, restitution was a discouraged factor and the amount of restitution in the instant case was not "extraordinary."

D. ENCOURAGED FACTORS

Based on Guideline Provisions

Chapter Five, Part K, lists factors that the Commission has identified as encouraged factors that may constitute grounds for departure but considers this list as non-exhaustive.

- **Death — §5K2.1.** *United States v. Terry*, 142 F.3d 702 (4th Cir. 1998), cert. denied, 120 S. Ct. 317 (1999), remanded for further findings in accordance with the dictates of the guideline where the district court departed upward 4 levels for the uncharged death of a participant in the aggressive driving that led to the defendant's conviction for involuntary manslaughter. The death of a victim who participated in the activity that resulted in his death can form the basis for

departure; the district court should have made findings to support the level of departure, including findings on whether the defendant's recklessness was adequate to establish malice.

- S** ***Kidnaping Victim.*** *United States v. Van Metre*, 150 F.3d 339 (**4th Cir.** 1998), noted that the kidnaping guideline provided an adjustment if the kidnaping was done to facilitate the commission of another offense. In this case, however, the victim was kidnaped for the purpose of sexual assault and only later did the defendant form the intent to murder her. Because the guideline does not take into account these facts, an upward departure to life imprisonment based on the kidnaping victim's death was not an abuse of discretion.
- **Extreme Psychological Injury — §5K2.3.** *United States v. Jacobs*, 167 F.3d 792 (**3d Cir.** 1999), remanded a 5-level upward departure under §5K2.3 for "extreme psychological injury" because the district court did not find that the victim's psychological injury was "much more serious than that normally resulting from the commission" of the crime of aggravated assault, a finding that is a prerequisite for a departure under §5K2.3. The district court focused on a portion of the guideline that explains the types of situations which may rise to the level of psychological injury without making the preliminary finding of injury beyond the heartland of injuries from the same offense.
- S** ***Extreme Psychological Injury Resulting from Bank Robbery.*** *United States v. Sawyer*, 180 F.3d 1319 (**11th Cir.** 1999), upheld a 2-level upward departure for extreme psychological injury (§5K2.3) to bank tellers who were employed at the bank the defendant robbed. The court noted that a departure for extreme psychological injury is warranted if it is "much more serious than that normally resulting from commission of the offense." More than two and one-half years after the robbery, the victims still did not feel safe at work, were especially cautious entering and leaving the bank, and had restricted their daily activities. Upon extensive review of the record, the court found that the district court did not abuse its discretion in departing two levels upward for extreme psychological injury.
- **Disruption of a Government Function — §5K2.7.** *United States v. Baird*, 109 F.3d 856 (**3d Cir.**), *cert. denied*, 118 S. Ct. 243 (1997), affirmed an upward departure based on consideration of underlying counts dismissed pursuant to a plea agreement. The district court found that the defendant's involvement in a large police corruption scandal in Philadelphia caused a significant disruption of governmental functions pursuant to §5K2.7 and warranted an upward departure.
- S** ***Extent of Departure Based on Disruption of Government Function.*** *United States v. Horton*, 98 F.3d 313 (**7th Cir.** 1996), reversed in part an upward departure and remanded for a determination of the extent of the departure "in view of the scant grounds" articulated. The basis for the upward departure, that the defendant's conduct resulted in a significant disruption of a governmental function, was affirmed.

- **Extreme Conduct — §5K2.8.** *United States v. Davis*, 170 F.3d 617 (6th Cir.), 120 S. Ct. 151 (1999), upheld an 8-level upward departure for extreme conduct based on a telemarketer's extremely demeaning conduct toward his victims, noting that, although there was no serious physical injury, there was intentional infliction of psychic injury. The court of appeals reversed the upward departure on the same basis for a codefendant who the district court had described as using a "friendly demeanor that resulted in psychological harm to his victims."

- S **Second Degree Murder Case.** *United States v. Roston*, 168 F.3d 377 (9th Cir. 1999), held that the district court did not abuse its discretion by imposing a 7-level upward departure under the "extreme conduct" provision of the sentencing guidelines (§5K2.8). The court noted that evidence presented at the sentencing hearing showed that the defendant severely beat and strangled his wife before throwing her body overboard on the final night of their honeymoon cruise. In light of the severity of the crime and the unusually cruel circumstances of the death of the defendant's wife, the court found the district court was well-positioned to determine the facts of this case were unusually cruel or brutal, as compared to other second-degree murder cases, thus warranting an upward departure of seven levels.

- S **Torturing Victim.** *United States v. Cross*, 121 F.3d 234 (6th Cir. 1997), affirmed an upward departure based on the defendant's participation in torturing the victim. The appellate court concluded that the defendant's conduct which formed part of a count dismissed pursuant to a plea agreement could still be considered as a basis for an upward departure.

- S **Sexual Assault.** *United States v. Lewis*, 115 F.3d 1531 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 733 (1998), affirmed an upward departure based on the degrading nature of the defendant's sexual assaults. According to the appellate court, the number of assaults involved and the viciousness of the acts were degrading in type, insulting in nature, and represented an encouraged basis for departure from the guidelines.

- S **Kidnaping Victim.** *United States v. Sherwood*, 98 F.3d 402 (9th Cir. 1996), reversed in part an upward departure based on the defendant's conduct toward a kidnaping victim. According to the appellate court, the abuse was so unusual and degrading that it warranted a departure for extreme conduct.

- S **Prolonged Harassment.** *United States v. Taylor*, 88 F.3d 938 (11th Cir. 1996), affirmed an upward departure based on prolonged harassing and humiliating conduct directed toward the defendant's former high school girlfriend and her family. According to the appellate court, the harassment violated state and federal restraining orders and warranted a departure for extreme conduct.

- **Lesser Harms — §5K2.11.** *United States v. Clark*, 128 F.3d 122 (2d Cir. 1997), remanded a district court’s denial of downward departure based on the lesser harms paragraph of §5K2.11 for a felon who had illegally purchased a firearm for his brother. The court noted that the second paragraph, where a defendant’s conduct might not have caused the harm sought to be prevented, might have applied, and the district court may have misunderstood its authority to depart.

- S *United States v. Barajas-Nunez*, 91 F.3d 826 (6th Cir. 1996), remanded a downward departure for “lesser harms,” based on the defendant’s belief that his girlfriend was in danger, directing the district court to explain the magnitude of the departure.

- S *United States v. Bernal*, 90 F.3d 465 (11th Cir. 1996), affirmed a downward departure based on a finding that the defendant’s conduct did not threaten the harm sought to be prevented by the statutes of conviction. The defendant was convicted of attempting to export an orangutan and a gorilla. The defendant intended to export animals for breeding and exhibition. According to the appellate court, the “special factor” in this case was an encouraged departure factor listed at §5K2.11.

- **Coercion and Duress — §5K2.12.** *United States v. Gallegos*, 129 F.3d 1140 (10th Cir. 1997), rejected a downward departure based, among other things, on coercion, where the only evidence was the defendant’s comment that she would not testify against a codefendant because she was scared. Coercion must involve a threat of physical injury, substantial damage to property or similar injury, and it must also occur at the time of the offense.

- **Diminished Capacity — §5K2.13.** *United States v. Valdez*, 158 F.3d 1140 (10th Cir. 1998), held that a defendant convicted of bank robbery, which requires the use of force and violence or intimidation, was not eligible for a downward departure for non-violent offense committed by a defendant suffering from significantly reduced mental capacity.

- S ***Impulse Control Disorder.*** *United States v. Miller*, 146 F.3d 1281 (11th Cir. 1998), *cert. denied*, 119 S. Ct. 915 (1999), reversed a departure based on the defendant’s impulse control disorder and on the defendant’s claim that, despite his conviction, he was not a pedophile. The defendant argued that he used the images of children in barter to get pornographic images he was interested in and that his impulse control disorder contributed to his pornographic interest. The court of appeals rejected the departure on several grounds. First, just because the defendant was not a pedophile, the harm in the offense is sustaining a market for child pornography, of which the defendant was guilty. Second, impulse control disorders are not unusual among those who collect child pornography, so this aspect of the defendant’s personality did not separate him from other defendants. Finally, the testimony failed to link the disorder to the offense, so no §5K2.13 departure for diminished capacity was appropriate.

- S** ***Volitional Impairment.** United States v. McBroom*, 124 F.3d 533 (**3d Cir.** 1997), remanded where the district court failed to make a factual finding regarding the possibility that the defendant suffered from a volitional impairment which prevented him from controlling his behavior or conforming to the law. The appellate court agreed with the defendant that the definition of “significantly reduced mental capacity” contained a volitional component not adequately considered by the district court when determining the defendant’s eligibility for a downward departure pursuant to §5K2.13.
- S** ***Lack of Causal Relationship to Offense.** United States v. Withers*, 100 F.3d 1142 (**4th Cir.** 1996), *cert. denied*, 520 U.S. 1132 (1997), remanded a downward departure based on diminished mental capacity. According to the appellate court, because there was no demonstration that the defendant’s significantly reduced mental capacity bore a causal relationship to the crime or that the defendant had an inability to process information, there was no support for such a significant departure.
- S** ***Lack of Education and Inability to Speak English.** United States v. Barajas-Nunez*, 91 F.3d 826 (**6th Cir.** 1996), remanded a downward departure for diminished mental capacity based on the defendant’s lack of education and inability to speak English. According to the appellate court, these factors did not constitute diminished mental capacity as a matter of law, and were otherwise invalid or discouraged. The other ground for the departure, “lesser harms,” based on the defendant’s belief that his girlfriend was in danger, was not found to be plainly erroneous. On remand, the district court was directed to explain the magnitude of the departure.
- **Public Welfare — §5K2.14.** *United States v. Hardy*, 99 F.3d 1242 (**1st Cir.** 1996), affirmed an upward departure based on the defendant’s persistent ten-year history of violent antisocial behavior and dangerous gang-related conduct underlying the offense. The appellate court concluded that shooting indiscriminately into crowded areas and discarding weapons in residential neighborhoods threatened public safety and warranted an upward departure.
 - **Voluntary Disclosure of Offense — §5K2.16.** *United States v. Jones*, 158 F.3d 492 (**10th Cir.** 1998), upheld a downward departure based in part on the defendant’s voluntary disclosure of facts underlying his false statements offense. While the defendant was not motivated by the knowledge that discovery of his offense was imminent, as required for departure under §5K2.16, the offense was nonetheless likely to be discovered. Thus, the circumstances fall in between the express provisions of §5K2.16. The fact that the defendant received a 3-level downward adjustment for acceptance of responsibility does not preclude departure on this basis the acceptance reduction is easily achieved where the defendant enters a timely guilty plea and would not account for this defendant’s actions.
- S** ***Lacked Finding that Discovery of Offense Was Unlikely Absent Disclosure.** United States v. Besler*, 86 F.3d 745 (**7th Cir.** 1996), remanded a downward departure where the defendant voluntarily disclosed the offense prior to its discovery,

but the district court did not make particularized findings that discovery was unlikely absent disclosure.

Based on Specific Commentary and Criminal History

Other specific commentary within selected guideline provisions and other issues regarding inadequacy of criminal history also provide grounds for guideline departures.

Specific Commentary

- **First Degree Murder — §2A1.1.** *United States v. Nichols*, 169 F.3d 1255 (10th Cir.), *cert. denied*, 1999 WL 462439 (Oct. 12, 1999), upheld the district court's refusal to depart based on the defendant's contention that he did not cause death intentionally or knowingly, pursuant to §2A1.1, comment. (n.1). Nichols argued that the district court was required first to make findings regarding the defendant's mental state in its determination whether a downward departure is appropriate. The court of appeals held that nothing in the guideline requires the district court to make any such findings before deciding whether to depart, disagreeing with *United States v. Prevatte*, 16 F.3d 767, 784 (7th Cir.1994).
- **Involuntary Manslaughter — §2A1.4.** *United States v. Terry*, 142 F.3d 702 (4th Cir. 1998), *cert. denied*, 120 S. Ct. 317 (1999), ordered a remand to consider whether the danger created by the defendant's *reckless conduct* while driving was outside the "heartland" of the typical reckless driving involuntary manslaughter case. The circuit court noted that reckless driving is already taken into account by the involuntary manslaughter guideline. Under *Koon*, the sentencing court therefore must determine whether the defendant's reckless driving was "preserved to an exceptional degree" or was in some other way different from the ordinary case where the factor is present.
- **S Excessive Recklessness.** *United States v. Whiteskunk*, 162 F.3d 1244 (10th Cir. 1998), upheld a 3-level upward departure based on the defendant's *excessive recklessness*. The defendant was convicted of involuntary manslaughter; the court cited, as factors taking her conduct of driving while intoxicated out of the heartland of typical cases, that her blood alcohol content was more than twice the legal limit, that she had sustained prior conviction for driving while intoxicated, and that she had at least three opportunities to correct her behavior.
- **Extortion — §2B3.2.** *United States v. Cuddy*, 147 F.3d 1111 (9th Cir. 1998), upheld a 2-level departure based on an application note to the extortion guideline, which states that an upward departure may be warranted if the offense involved a *threat to a family member of the victim*. The defendants were convicted of interference with interstate commerce by threats of violence after kidnapping the daughter of a hotel owner and demanding ransom. The victim of the extortion was the hotel owner and the defendants explicitly threatened his daughter's life.

- **Fraud — §2F1.1.** *United States v. Robie*, 166 F.3d 444 (2d Cir. 1999), vacated a sentence wherein the district court had erroneously based its calculation of loss on the gain to the defendant. The court of appeals noted that, on remand, the district court may wish to depart under the provision in the fraud guideline that where the loss determined does not fully capture the harmfulness of the conduct, an upward departure may be warranted. The defendant stole misprinted postal stamps from the Postal Service and sold them to collectors, after misrepresenting that they had been issued by the Postal Service. The Postal Service was the victim of the theft but suffered no “direct” loss as a result, since the Postal Service had no value for the stamps beyond their destruction. Theft of the misprints would be an appropriate application of the departure provision because of the real but intangible loss in the form of embarrassment and the appearance of incompetence inflicted on the Postal Service.

- S ***Low Probability of Success.*** *United States v. Bonanno*, 146 F.3d 502 (7th Cir. 1998), held that a departure for low probability of success of a scheme to defraud was not applicable when the victims had been bilked of over \$600,000.

- S ***Economic Reality of the Intended Loss.*** *United States v. Stockheimer*, 157 F.3d 1082 (7th Cir. 1998), *cert. denied* 119 S. Ct. 1127 (1999), held that, where the offense level for mail and bank fraud was based on an intended loss of \$80 million, but neither the actual nor the probable loss rose to that level, the district court erred in refusing to consider a downward departure based on the economic reality of the intended loss.

- **Hate Crime Motivation or Vulnerable Victim — §3A1.1.** *United States v. Brown*, 145 F.3d 477 (6th Cir. 1998), upheld an upward departure based on the age of telemarketing victims. Congress expressed the view, manifest in the Senior Citizens Against Marketing Scams, that the guidelines do not sufficiently punish the defendants who target the elderly; such offense behavior is not adequately accounted for by relevant conduct, role in the offense or vulnerable victim adjustments.

- **Aggravating or Mitigating Role in the Offense — §§3B1.1 and 3B1.2.** *United States v. Cali*, 87 F.3d 571 (1st Cir. 1996), affirmed an upward departure based on a finding that the defendant’s management of the assets of a large-scale criminal enterprise was outside the heartland of the aggravated role adjustment.

- S ***Mitigating Role Reduction.*** *United States v. Romualdi*, 101 F.3d 971 (3d Cir. 1996), reversed a downward departure based on a finding that the defendant's conduct, possession of child pornography, was analogous to a situation qualifying for a mitigating role reduction. According to the appellate court, because the defendant pleaded guilty to possession of child pornography, an offense not requiring concerted activity, the mitigating role adjustment is not available by analogy or otherwise.

- **Use of a Minor — §3B1.4.** *United States v. Porter*, 145 F.3d 897 (7th Cir. 1998), upheld an upward departure based on the use of a minor in furthering a mail fraud. The defendant, a licensed stockbroker, convinced a 15-year-old relative to rent a post office box in the name of one of the defendant's clients, purportedly to receive home schooling materials for the 15 year old. The post office box was actually used to receive proceeds from stocks sold on the client's account which the client never authorized. The defendant used proceeds for a personal business and to repay a loan. At the time of sentencing the district court utilized the 1994 Guidelines Manual which had no provision for use of a minor. The court noted that the Commission did not intend by its reference to the involvement of underage individuals in drug offenses under §2D1.2 to preclude a departure under another guideline where the defendant may have involved a minor in a different offense. The court agreed that the validity of the upward departure for use of a minor is bolstered by the 1995 amendment to §3B1.4 of the guidelines because it indicates that the Commission believed the 1994 version omitted a factor deemed relevant to the guidelines sentencing scheme. The court held that it is such an omission that is a proper basis for a departure.
- **Post-Offense Rehabilitation — §3E1.1.** *United States v. Bryson*, 163 F.3d 742 (2d Cir. 1998), vacated a downward departure based on post-offense rehabilitation where the evidence was insufficient to support a conclusion that rehabilitation had taken place and district court had only vaguely stated its findings on rehabilitation while expressing dissatisfaction with the guideline range.

S *United States v. Green*, 152 F.3d 1202 (9th Cir. 1998), held that, under *Koon*, post-offense rehabilitation is a proper basis for departure upon resentencing. Consistent with the **Second, Third, and District of Columbia Circuits**, the court found that the defendant's post-sentencing efforts were sufficiently "extraordinary" and "exceptional" to take the case outside of the "heartland." The defendant's voluntary efforts in community service by assisting needy and deprived youth was "exemplary." The defendant's availability for daily tutoring, computer training programs and special events was "above and beyond" atypical post-sentencing efforts. While the defendant was required to do community service, there was no requirement to become actively engaged in that experience.

S *United States v. Whitaker*, 152 F.3d 1238 (10th Cir. 1998), held that post-offense drug rehabilitation can form the basis for departure, effectively overruling prior circuit precedent to the contrary. The court found that although addiction and abuse are typically forbidden as a basis for departure, this does not preclude consideration of post-offense drug rehabilitation efforts. These efforts are to be evaluated by the same standards as a defendant's efforts at any other form of rehabilitation.

S *United States v. Rhodes*, 145 F.3d 1375 (D.C. Cir. 1998); *United States v. Sally*, 116 F.3d 76 (3d Cir. 1997); *United States v. Brock*, 108 F.3d 31 (4th Cir. 1997); and *United States v. Kapitzke*, 130 F.3d 820 (8th Cir. 1997), all held that post-

offense rehabilitation is a factor already taken into account by the acceptance of responsibility guideline, §3E1.1; thus, departure is warranted only if the defendant's efforts are exceptional enough to be atypical of cases in which the acceptance of responsibility adjustment is usually granted.

- S** *United States v. Core*, 125 F.3d 74 (**2d Cir.** 1997), *cert. denied*, 118 S. Ct. 735 (1998), remanded a case to the district court to determine whether the defendant's post-offense rehabilitation while in prison warranted a downward departure when he appeared before the court for resentencing. The appellate court found nothing in the pertinent statutes or guidelines to prevent a sentencing judge from considering rehabilitation in prison as a basis for departure if resentencing becomes necessary. The court acknowledged the mention of post-offense rehabilitation in the acceptance of responsibility guideline, but did not interpret that to preclude consideration of such rehabilitation as a basis for departure. The court's analysis concluded that such rehabilitation, if sincere, is not adequately taken into account by the guidelines.
- S** *United States v. Brock*, 108 F.3d 31 (**4th Cir.** 1997), remanded where the district court, prior to *Koon*, revealed that its refusal to consider a downward departure for post-offense rehabilitation was because it believed that the law of the circuit prohibited it from doing so. According to the **Fourth Circuit**, the *Koon* decision rejected the reasoning used in its prior decision and effectively overruled its decision that post-offense rehabilitation can never form a proper basis for departure. Because post-offense rehabilitation is taken into account in the acceptance of responsibility guideline, a departure based on post-offense rehabilitation is permitted "only when present to such an exceptional degree that the situation cannot be considered typical of those circumstances in which an acceptance of responsibility is granted."

METHODOLOGY FOR CRIMINAL HISTORY DEPARTURES

- ***Departing Horizontally to Career Offender Guideline Range Appropriate to Reflect Seriousness of Offense Conduct.*** *United States v. Lawrence*, 161 F.3d 250 (**4th Cir.** 1998), *cert. denied*, 119 S. Ct. 1279 (1999), and *appeal after remand, United States v. Lawrence* 2000 WL 49461 (**4th Cir.** 2000), reiterated **Fourth Circuit** methodology for criminal history departures. If a court chooses to depart based on an inadequately represented criminal history, it has two options. A sentencing court should depart first to the next higher category and move on to a still higher category only upon a finding that the next higher category fails adequately to reflect the seriousness of the the defendant's record. If the court gets to level VI and determines that its sentencing options are still insufficient and that the defendant's prior criminal conduct is of sufficient seriousness to conclude that he should be treated as a career offender, the district court may depart directly to the guideline range applicable to career offenders similar to the defendant.

- ***Consideration of Intermediate Categories Required to Justify Category VI Range.***
United States v. Boe, 117 F.3d 830 (**5th Cir.** 1997). The defendant moved for modification of his sentence pursuant to 18 U.S.C. § 3582(c)(2), requesting that his sentence be reduced in light of a 1995 amendment to the guidelines which changed the method of calculating the weight equivalency of marijuana plants. The district court declined to reduce the sentence, stating that the defendant's criminal score underrepresented the seriousness of the defendant's past conduct. The **Fifth Circuit** remanded, noting that, even including an old conviction, the criminal history category would have been II, whereas the sentence received by the defendant was equivalent to category VI. The district court erred by failing to consider intermediate categories and would have to justify a category VI range.
 - ***Departing Horizontally Required in Upward Departure for Criminal History.***
United States v. Tropiano, 50 F.3d 157 (**2d Cir.** 1995), rejected a vertical departure of 7 levels for the defendant, a confirmed recidivist at the peak of his criminal career. The 7-level increase was based on the defendant's criminal record and likelihood of recidivism, core concepts of criminal history to be considered as grounds for departure under §4A1.3. The court noted that the district court circumvented the strictures of a §4A1.3 horizontal departure by treating criminal history concerns as aggravating circumstances that affected the offense level under §5K2.0. This vertical departure resulted in a sentencing range that exceeded what a Category VI criminal history would have allowed had the district court proceeded step by step horizontally.
- S Other circuits have not adopted so rigid a demarcation between §4A1.3 and §5K2.0 departures and those circuits will affirm §5K2.0 departures based on criminal history concerns. *See, e.g., United States v. Schmeltzer*, 20 F.3d 610, 613 (**5th Cir.** 1994) (affirming §5K2.0 departure based on prior convictions for a very similar offense); *United States v. Nomeland*, 7 F.3d 744, 747-48 (**8th Cir.** 1993) (affirming §5K2.0 departure based on the defendant's extensive and violent criminal activity).

- **Adequacy of Criminal History Category — §4A1.3**

The guidelines suggest that in considering a departure for adequacy of criminal history category the court use, as a reference, the guideline range for a defendant with a higher or lower criminal history category. If, for example, the court concludes that Criminal History Category III underrepresents the seriousness of the defendant's criminal history, the court should look to the guideline range specified for a defendant with Criminal History Category IV to guide its departure. §4A1.3 (p.s.) These departures are referred to as horizontal, because they move along the horizontal axis of the Sentencing Table.

Where the court determines that the extent and nature of the defendant's criminal history, taken together, are sufficient to warrant an upward departure from Criminal History Category VI, the court should structure the departure by moving incrementally down the sentencing table to the next higher offense level in Criminal History Category VI until it finds a guideline range

appropriate to the case. §4A1.3 (p.s.) Some examples of appellate court analyses of criminal history departures follow:

Grounds for Criminal History Departures (Upward or Downward)

- ***Uncounted Foreign Convictions.*** *United States v. Fordham*, 187 F.3d 344 (3d Cir. 1999), affirmed an upward departure based on the defendant's foreign conviction which was not counted in criminal history. The district court found that the defendant's Criminal History Category I significantly underrepresented the seriousness of the defendant's criminal history and departed to category II based on the uncounted foreign conviction. The appellate court concluded that the district court was within its discretion to hold that the foreign conviction was fair and upheld the departure.
 - ***Commission of Additional Offenses While on Supervised Release.*** *United States v. King*, 150 F.3d 644 (7th Cir. 1998), approved an upward departure under §4A1.3 for the commission of five bank robberies while on supervised release from earlier conviction for bank robbery.
 - ***Excess Number of Criminal History Points.*** *United States v. Melgar-Galvez*, 161 F.3d 1122 (7th Cir. 1998), upheld a 1-level upward departure based on district court's belief that since the defendant had amassed 18 criminal history points, the criminal history category did not reflect the seriousness of his prior record. The court of appeals noted that an upward departure may be based strictly on an excess number of criminal history points.
 - ***Criminal History Category Did Not Adequately Reflect Seriousness of Offense.*** *United States v. Herr*, 2000 WL 122345 at *1 (8th Cir. 2000), held that the district court did not abuse its discretion by departing upward for purposes of deterrence based on the defendant's prior dissimilar convictions, even though prior convictions were not sufficiently as serious as the instant offense. The defendant's repeated violations, including convictions for failure to appear and resisting arrest, showed the defendant's disrespect for the law and provided support that leniency towards the defendant had not been effective.
- S** *United States v. Perez*, 160 F.3d 87 (1st Cir. 1998), upheld a refusal to depart downward from career offender status on the basis that it overstated the seriousness of her conduct: the defendant claimed that she was a "small player," outside the heartland of career offenders, because the amounts of drugs, and her role in the offenses, had been small.
- S** *United States v. Tejada*, 146 F.3d 84 (2d Cir. 1998), rejected a departure on the basis that the defendant's career offender status significantly overstated the seriousness of his criminal history. The court noted that the light sentences the defendant received for his predicate offenses more appropriately warranted upward departure.

- S** *United States v. Collins*, 104 F.3d 143 (**8th Cir.** 1997), affirmed an upward departure based on findings that the defendant's criminal history category did not adequately reflect the seriousness of the defendant's past criminal conduct in light of evidence that the defendant participated in approximately 16 burglaries for which neither state nor federal charges were ever brought.
- S** *United States v. Ewing*, 129 F.3d 430 (**7th Cir.** 1997), affirmed an upward departure based in part on the defendant's high number of criminal history points—25, when category VI begins at 13 points. The district court added 1 offense level for every 3 criminal history points that exceeded 15. The appellate court found this methodology reasonable and sufficiently linked to the structure of the guidelines.
- S** *United States v. Lowe*, 106 F.3d 1498 (**10th Cir.**), *cert. denied*, 521 U.S. 1110 (1997), affirmed an upward departure based on a finding that the defendant's status as a career offender did not adequately represent the defendant's criminal past. According to the appellate court, although the defendant's criminal history score was relatively low (16), the nature of the defendant's prior offenses warranted an upward departure from Criminal History Category VI.
- S** *United States v. Collins*, 122 F.3d 1297 (**10th Cir.** 1997), affirmed a downward departure for a defendant who technically qualified as a career offender but whose criminal history and likelihood of recidivism significantly differed from the heartland of career offenders. The sentencing court based its finding on a combination of the defendant's age (64 at sentencing), infirmities (heart disease, high blood pressure, ulcers, arthritis, prostatitis) and the fact that one predicate conviction was almost ten years old and had resulted in a relatively lenient sentence. The appellate court stated that, taken in the context of the other circumstances of a defendant's criminal history, age could be germane to whether the career offender category is appropriately applied to a defendant.
- ***Similar Prior Conviction Not Adequately Considered.*** *United States v. Ward*, 131 F.3d 335 (**3d Cir.** 1997), affirmed an upward departure based on a prior sexual assault for a defendant being sentenced for kidnaping and sexual assault. The prior similar conviction was not adequately considered in the defendant's criminal history because, in view of the defendant's current offense, there is a qualitative difference between a conviction for any offense resulting in a term of imprisonment of more than one year and a conviction for a prior sexual assault.
 - ***Repeat Offender of Same Offense/Excessive Criminal History Points.*** *United States v. Ewing*, 129 F.3d. 430 (**7th Cir.** 1997), affirmed an upward departure based on the defendant's high number of criminal history points (25), outdated prior sentences, and a finding that the defendant repeatedly committed the same offense.

Other Encouraged Factors Based on Developing Case Law

- **Post-Sentence Rehabilitation.** *United States v. Rudolph*, 190 F.3d 720 (6th Cir. 1999), held that the district court erred in not exercising its legal authority, on resentencing, to depart downward on the basis of a defendant's post-sentence rehabilitation provided that the rehabilitation was "extraordinary" or "exceptional."
- **Subsequently Dismissed Charges.** *United States v. Millsaps*, 157 F.3d 989 (5th Cir. 1998), held that an upward departure based on charges in the superseding indictment that were subsequently dismissed did not violate due process. The court relied on an earlier decision, *United States v. Ashburn*, 38 F.3d 803 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1969 (1995), in which it stated that §4A1.3 expressly authorizes the Court to consider "prior adult criminal conduct not resulting in a conviction."

E. UNMENTIONED FACTORS

There are other grounds for departure not mentioned in the guidelines upon which courts can depart. The courts have reversed or affirmed departure sentences based on numerous factors:

- **Voluntary Deportation.** *United States v. Galvez-Falconi*, 174 F.3d 255 (2d Cir. 1999), ordered a remand to consider whether the defendant has presented a colorable, non-frivolous defense to deportation that would substantially assist in the administration of justice enough to warrant a downward departure. The circuit court noted that the record was ambiguous on the question of whether the district court was aware of its authority to grant a downward departure on the basis of the defendant's consent to deportation in the absence of the government's consent.
- **Miscalculation of Loss Capturing Harmfulness of Defendant's Conduct.** *United States v. Robie*, 166 F.3d 444 (2d Cir. 1999), vacated a sentence imposed by district court in which it erroneously based its calculation of loss on the gain to the defendant. The court of appeals noted that, on remand, the district court may wish to depart under the provision in the fraud guideline that where the loss determined does not fully capture the harmfulness of the conduct, an upward departure may be warranted. The defendant stole misprinted postal stamps from the Postal Service and sold them to collectors, after misrepresenting that they had been issued by the Postal Service. The Postal Service was the victim of the theft but suffered no "direct" loss as a result, since the Postal Service had no value for the stamps beyond their destruction. Theft of the misprints would be an appropriate application of the departure provision because of the real but intangible loss in the form of embarrassment and the appearance of incompetence inflicted on the Postal Service.
- **Offenses Charged in Indictment Without Jury Verdict Being Reached.** *United States v. Mapp*, 170 F.3d 328 (2d Cir. 1999), upheld an upward departure based on the district court's finding, by clear and convincing evidence, that the defendant participated in three robberies that had been charged in the indictment but as to which the jury was unable to reach a verdict.

- ***Extent of Harm Posed by Defendant's Conduct.*** *United States v. Leahy*, 169 F.3d 433 (7th Cir. 1999), upheld the district court's departure upward from the offense levels specified §2K2.1 where that guideline was being used only as the most analogous guideline for the instant offense, and therefore did not consider the type or extent of harm posed by the defendant's conduct. The defendant was convicted under 18 U.S.C. § 175 for possession of ricin, a highly toxic substance for which there is no guideline. The court of appeals expressed doubt that a case in which a district court is required to apply the most analogous guideline pursuant to USSG §2X5.1 can ever be found to fall within the heartland of that guideline. It was noted by the court that this case is, by definition, an unusual case and suitable as a candidate for upward or downward departure.
- ***Money Laundering Minimal Part of Overall Offense Conduct.*** *United States v. Threadgill*, 172 F.3d 357 (5th Cir.), cert. denied, 120 S. Ct. 172 (1999), affirmed downward departure (reducing sentences from between 40 percent to 75 percent of presumptive range) based on the fact that the defendants' money laundering activities "were incidental to the gambling operation" (laundered only \$500,000 of \$20,000,000 in gross wagers) and that the "defendants' conduct was atypical because the defendants never used the laundered money to further other criminal activities"; in the process the **Fifth Circuit** expressly abrogates *United States v. Willey*, 57 F.3d 1374 (5th Cir.), cert. denied, 516 U.S. 1029 (1995) (departure cannot be justified on finding that the subject crime was "disproportionately a small part of the overall criminal conduct") in light of *Koon*.
- ***Substantial, Voluntary Restitution.*** *United States v. Oligmueller*, 198 F.3d 669, 672 (8th Cir. 1999), held that departing downward on the basis of the defendant's extraordinary efforts at restitution was not an abuse of discretion. Upon the bank's discovery of the defendant's misrepresentation of assets claimed in order to secure a bank loan, the defendant began liquidating assets owned, pledged or unpledged, in order to repay the bank. Over a one-year period, the defendant repaid the bank most of the money owed while simultaneously and substantially reducing the bank's loss amount from over \$800,000 to less than \$60,000. The court noted that the defendant voluntarily began making restitution almost a year before he was indicted and the restitution paid nearly 94 percent of that owed to the bank. In such case the court held the defendant's substantial voluntary restitution was "extraordinary" and appropriate as a basis for a downward departure.
- ***Conduct Not Typical Money Laundering Conduct.*** *United States v. Hemmingson*, 157 F.3d 347 (5th Cir. 1998). The **Fifth Circuit** held that the district court did not abuse its discretion when it determined that the defendant's offenses did not fall within the heartland of the money laundering guideline, and instead departed downward by applying the fraud guideline which resulted in lower sentencing range. Defendants in a campaign contribution case were convicted of interstate transportation of stolen property, money laundering, and engaging in a monetary transaction with criminally derived property, and one of them was also convicted of making false statements to a federal agent. The district court determined that money laundering guideline primarily targets large-scale money laundering, which often involves the proceeds of

drug trafficking or other types of organized crime, while present case involved use of conduit to conceal the fact that corporate funds were infused into a political campaign. The district court relied in part on the DOJ manual in determining whether case represented typical money laundering offense.

- ***Concentrated Form of Heroin.*** *United States v. Doe*, 149 F.3d 634 (**7th Cir.** 1998), *cert. denied*, 119 S. Ct. 260 (1998), upheld an upward departure to account for the concentrated form of heroin involved; the court departed 6 levels to the offense level appropriate if the high-purity heroin had been converted to street-level purity. The court stated that §2D1.1 was intended to work in this way.
- ***Dismissed Counts.*** *United States v. Hernandez*, 160 F.3d 661 (**11th Cir.** 1998), vacated an upward departure based on three dismissed counts of deposit account fraud listed in the presentence investigation report, since the report did not relate the facts on which the counts were based and the defendant denied that he engaged in the alleged fraud.
- ***Substantial Harm to the Victims.*** *United States v. Wells*, 101 F.3d 370 (**5th Cir.** 1996), affirmed an upward departure based on a finding that the defendant's conduct caused substantial harm to the victims stemming from a credit card scheme which led to years of harassment by creditors, forced court appearances, forgery charges, and constant fear of arrest.
- ***Aberrant Behavior.*** There are two different standards applied by the courts in determining whether to depart on the basis of aberrant behavior: (1) the “**spontaneous and thoughtless**” standard; and (2) the “**totality of the circumstances**” standard.

“Spontaneous and Thoughtless” Standard. *United States v. Paster*, 173 F.3d 206 (**3d Cir.** 1999), upheld the district court's denial of a downward departure based on defendant's aberrant behavior. The **Third Circuit**, joined the **Fourth, Fifth, and Seventh Circuits**, in adopting the *Marcello*⁹ formula for determining aberrant behavior as a basis for a downward departure. The *Marcello* court wrote that “aberrant behavior” must involve a lack of planning; it must be a single act that is spontaneous and thoughtless, and no consideration is given to whether the defendant is a first-time offender.”¹⁰ In *Paster*, the defendant murdered his wife for her infidelity by inflicting multiple stab wounds to her body. The district court found that defendant had ample time in the minutes preceding the stabbing to think about whether to murder his wife and that the number of times defendant stabbed his wife indicated that he thought about the act as it was being done. The appellate court agreed that the principles announced in *Marcello*, as adopted by the district court, did not qualify defendant for an aberrant behavior departure.

⁹13 F.3d 752 (**3d Cir.** 1994) (reversed downward departure based on a single act of aberrant behavior because defendant's act was not “spontaneous” or “thoughtless” but instead was a result of substantial planning and reflection).

¹⁰*Id.* at 761.

- S *United States v. Pickering*, 178 F.3d 1168 (**11th Cir.** 1999), upheld denial of a downward departure on the basis of aberrant behavior where defendant's conduct did not constitute a "single, aberrant act." The defendant's armed robbery of four banks in four months clearly did not constitute a single spontaneous and thoughtless act.
- S *United States v. Withrow*, 85 F.3d 527 (**11th Cir.** 1996), upheld the district court's denial of defendant's downward departure holding that the defendant's decision to steal the vehicle was neither spontaneous nor was it lacking in planned preparation. The defendant had an opportunity to reflect on the action he was about to take while he shopped around for a desirable vehicle. *See, generally, United States v. Williams*, 974 F.2d 25, 26 (**5th Cir.** 1992) (upheld denial of a downward departure on the basis of aberrant behavior because defendant had adequate time to consider his actions two days prior to bank robbery); *United States v. Andruska*, 964 F.2d 640, 645 (**7th Cir.** 1992) (reversed a downward departure based on aberrant behavior because of the defendant's continued involvement with a fugitive even after learning of her friend's fugitive status); *United States v. Glick*, 946 F.2d 335, 338 (**4th Cir.** 1991) (reversed a downward departure based on aberrant behavior of the defendant selling trade secrets to a competitor. The court found that the scheme required five separate mailings over a ten week period and as such did not constitute "a single act of aberrant behavior"); *United States v. Carey*, 895 F.2d 318, 325 (**7th Cir.** 1990) (reversed downward departure because defendant's 15-month-long check-kiting scheme required considerable preparation and numerous acts over an extended period of time and thus would not be considered aberrational in nature).

Other courts have applied a broader "**totality of the circumstances**" standard for departure decisions based on defendant's aberrant behavior. Courts applying this standard consider the defendant's course of conduct as a whole in contrast with the defendant's prior history.

"Totality of the Circumstances" Standard. *Zecevic v. United States Parole Commission*, 163 F.3d 731 (**2d Cir.** 1998), upheld the district court's refusal to depart downward for aberrant behavior. The **Second Circuit** joined the **First, Ninth and Tenth Circuits** in concluding that aberrant behavior is conduct which constitutes "a short-lived departure from an otherwise law-abiding life," and that the best test by which to judge whether conduct is truly aberrant is the "totality of the circumstances" test. For the purpose of determining eligibility for an aberrant behavior departure, courts may consider the following nonexclusive, nondispositive factors: (1) the singular nature of the criminal act, (2) the defendant's criminal record, (3) the degree of spontaneity and planning inherent in the conduct, (4) extreme pressures acting on the defendant, including any psychological disorders from which he may have been suffering, at the time of the offense, (5) the defendant's motivations for committing the crime, including any pecuniary gain he derived therefrom, and (6) his efforts to mitigate the effects of the crime.

- S *United States v. Garcia*, 182 F.3d 1165 (**10th Cir.** 1999), affirmed a downward departure based on the aberrant nature of defendant's conduct. The court found that

defendant's "carefully planned" cocaine transaction cannot be deemed aberrational. The appellate court noted that the **Tenth Circuit** has never held that application of the aberrant behavior departure requires the crime to be "spontaneous" but instead the focus should be on the *aberrational character* of defendant's conduct. The court held that the determination of whether an individual defendant's offense conduct is aberrational, like the decision to depart, requires consideration of unique factors not readily susceptible of useful generalization. It further held that the district court's resolution of the factors used to determine whether the defendant's offense conduct is out of character is largely a factual question for the district court.

- S** *United States v. Colace*, 126 F.3d 1229 (**9th Cir.** 1997), reversed a downward departure granted to the defendant, a bank robber, who engaged in criminal conduct because of heavy drug use and pressure to support his family. The defendant provided numerous letters of support attesting to his good character. The court noted that consideration of factors that might support a finding of aberrant behavior is appropriate only if the defendant's actions can be reasonably construed as a single course of conduct. The defendant committed robberies of 12 banks over a two-month period. The court found that because defendant committed a number of distinct criminal acts, each requiring individual preparation, there was no single course of conduct and thus no departure for aberrant behavior.
- S** *United States v. Grandmaison*, 77 F.3d 555 (**1st Cir.** 1996), reversed and remanded a denial of a downward departure by the district court. The case was remanded for reconsideration to apply the "totality of the circumstances" standard. The court noted that although the commission of only a single criminal act is not a prerequisite for this departure, this departure is only available if the criminal conduct at issue is "isolated and unlikely to recur."
- ***Threatened Communications.*** *United States v. Adelman*, 168 F.3d 84 (**2d Cir.** 1999), upheld an upward departure based on the fact that the defendant's threatening communications affected people other than the direct victim, a situation not provided for in the offense guideline §2A6.1. The defendant not only made threats to a judge but also indicated in one of the threatening phone messages that the judge's "kid" was held captive. Since the judge had three children, the court agreed that it was properly found that all three children were victims of the threatening behavior. The court held that since the multiple victim factor is sufficiently atypical causing it to fall outside the heartland of guideline §2A6.1, the district court was well within its discretion to upwardly depart.
 - ***Combination of Factors in Domestic Terrorism Case.*** *United States v. Leahy*, 169 F.3d 433 (**7th Cir.** 1999), affirmed the district court's departure from the offense levels specified in §2K2.1 where that guideline was being used only as the most analogous guideline for the instant offense, and therefore did not consider the type or extent of harm posed by the defendant's conduct. The defendant was convicted under 18 U.S.C. § 175 for possession of ricin, a highly

toxic substance; there is no guideline promulgated to cover this statute. The court of appeals expressed “doubt that a case in which a district court is required to apply the most ‘analogous’ guideline pursuant to USSG §2X5.1 can ever be found to fall within the ‘heartland’ of that guideline. Instead, we believe such a case is, by definition, an ‘unusual case’ and, therefore, a suitable candidate for either an upward or downward departure.” The factors relied upon by the district court were: (1) the maximum penalty for possession of a toxin under 18 U.S.C. § 175(a) is life whereas the maximum penalty for possession of a destructive device (covered by §2K2.1) is only ten years; (2) the number of toxins possessed by Leahy (two); (3) the high toxicity of ricin and other substances in the defendant’s possession; and (4) the potential for mass homicides afforded by ricin. In an extensive analysis, the court of appeals noted that several of the factors relied upon by the district court are arguably encouraged bases for upward departure under §§5K2.6 and 5K2.14.

- ***Adverse Civil Judgment.*** *United States v. Pennington*, 168 F.3d 1060 (8th Cir. 1999), rejected a prior adverse civil judgment as a basis for downward departure in sentencing for fraud. It was foreseeable that fraud victims would seek to recover damages in civil actions, and therefore the adverse judgment did not take the defendant’s case outside heartland of fraud cases. The court of appeals noted that an adverse civil judgment is quite different from the substantial, voluntary restitution that the court held was a permissible basis for downward departure in *United States v. Garlich*, 951 F.2d 161, 163 (8th Cir. 1991).
- ***Monetary Loss Overstates Gravity of Offense.*** *United States v. Brennick*, 134 F.3d 10 (1st Cir. 1998), vacated a downward departure predicated on the monetary loss overstating the gravity of the offense. The district court found that the defendant structured payments to delay payment of a portion of employment taxes. He ordinarily paid them, late, with penalties and interest, until his financial circumstances prevented him from doing so. The court concluded that there was no intent to defraud and, therefore, monetary loss was not a proper measure of culpability. The appellate court noted that the defendant’s intention to repay may remove his case from the heartland of tax evasion, but questioned the appropriateness of the district court’s borrowing from the fraud guidelines the concept of monetary loss overstating culpability. The court of appeals remanded, stating that the factors weighing against any departure, and certainly one of this degree, from a minimum of 41 months down to 13 months, received inadequate attention in the district court’s opinion.
- ***Uncredited Time Served in State Custody.*** *United States v. Montez-Gaviria*, 163 F.3d 697 (2d Cir. 1998), remanded to allow the district court to consider a departure based on uncredited time served by the defendant in state custody on a detainer lodged by the INS prior to the defendant’s conviction. The court concluded that a period of time during which an alien is incarcerated, solely due to the federal government’s delay in transferring the alien to federal custody, is a valid ground for departing from the guidelines to compensate for the uncredited time of confinement.
- ***Deterrent Effect of Hospitalization.*** *United States v. Marin-Castaneda*, 134 F.3d 551 (3d Cir.), cert. denied, 118 S. Ct. 1855 (1998), upheld a district court’s decision that it lacked

authority to depart based in part on the deterrent effect the defendant experienced when hospitalized for ingesting the heroin he attempted to import. The court noted that the defendant was aware of the health risks involved prior to the trip; the manifest danger in swallowing 90 pellets of heroin did not deter him in the first place, and the physical trauma, inherent in smuggling drugs in this manner, could hardly be considered an unusual characteristic.

- ***Extreme Psychological Injury Victim's Family Members.*** *United States v. Terry*, 142 F.3d 702 (**4th Cir.** 1998), *cert. denied*, 120 S. Ct. 317 (1999), held that the sentencing court abused its discretion in departing upward 3 levels for the extreme psychological injury to the family members of the victims who were killed. Although a departure for psychological injury to a victim is “not limited to the direct victim of the offense of conviction” but can also apply to indirect victims, an indirect victim is a victim “because of his relationship to the offense, not because of his relationship to the direct victim.”
 - ***Domestic Terrorist Activities.*** *United States v. Wells*, 163 F.3d 889 (**4th Cir.** 1998), *cert. denied*, 120 S. Ct. 109 (1999), upheld an upward departure based on the defendant's domestic terrorist activities, even though no provision at the time authorized the court to consider such activities as the basis for a departure.
 - ***Egregious Behavior.*** *United States v. Nevels*, 160 F.3d 226 (**5th Cir.** 1998), *cert. denied*, 119 S. Ct. 1130 (1999), upheld a 7-level upward departure based on egregious behavior. The defendant was convicted of possession of stolen mail; the district court cited, as egregious behavior warranting departure, the fact that the stolen Social Security checks are government securities; that recipients rely on these checks for subsistence; that the defendant had participated in this scheme for several months; that the defendant had jointly participated with others; that the defendant had used fake identifications.
 - ***Inducement of Parolees to Commit Crack Cocaine Offenses.*** *United States v. Coleman*, 188 F.3d 354 (**6th Cir.**), *vacated*, 138 F.3d 616 (**6th Cir.** 1998), held that the district court should have considered whether a downward departure was warranted based on the government's alleged improper targeting and inducement of African American parolees to commit crack cocaine offenses.
 - ***Government's Conduct.*** *United States v. Jones*, 160 F.3d 473 (**8th Cir.** 1998), remanded for consideration of a downward departure based on the fact that the government's conduct in reducing the sentences of more culpable coconspirators who testified (and being “less than forthright with the jury” about the arrangements) may have prejudiced the defendants.
- S** *United States v. Webb*, 134 F.3d 403 (**D.C. Cir.**), *on remand to* 1998 WL 93052 (1998), reversed a departure based on a claim that police waited until the third purchase of cocaine from the defendant before arresting him; absent a showing that the government agent overpaid for the drugs or led the defendant to commit a crime he

would otherwise not have committed, the government's conduct did not warrant departure.

- S** *United States v. Nolan-Cooper*, 155 F.3d 221 (**3d Cir.** 1998), remanded for a determination of whether an undercover agent's sexual misconduct with the defendant during the investigation was sufficient to take the case outside the heartland so as to justify a downward departure. The court of appeals stated that, under *Koon*, government investigatory misconduct that is unrelated or only tangentially related to the guilt of the defendant is an unmentioned departure factor and is not categorically proscribed from consideration.
- S** *United States v. Lopez*, 106 F.3d 309 (**9th Cir.** 1997), affirmed a downward departure based on a finding that government conduct prejudiced the defendant's case. The appellate court found that the prejudice the defendant encountered during plea negotiations was significant enough to take the case out of the heartland.
- S** *United States v. Shenberg*, 89 F.3d 1461 (**11th Cir.** 1996), *cert. denied*, 519 U.S. 1117 (1997), and 522 U.S. 1014 (1997), affirmed an upward departure based on a finding that the defendant's conduct was part of a systematic corruption of a governmental function causing loss of public confidence in government.
- ***Credit for Expired State Sentences.*** *United States v. O'Hagan*, 139 F.3d 641 (**8th Cir.** 1998), found that, under *Koon*, a downward departure for credit for expired state sentences based on the same conduct was not prohibited, although the applicable 1987 version of USSG §5G1.3 did not provide for such a departure.
 - ***Stock Proceeds Not Money Laundering Conduct.*** *United States v. Woods*, 159 F.3d 1132 (**8th Cir.** 1998), upheld a departure from the money laundering guideline, whereby the district court sentenced the defendant according to the offense level for the underlying offense, bankruptcy fraud. The court of appeals agreed that the main purpose of the money laundering statutes was to combat drug trafficking and organized crime, that the money laundering guidelines were designed to be used principally in that context, and that her deposit of proceeds from sale of stock that had been fraudulently concealed from bankruptcy trustee was not serious money laundering conduct contemplated for punishment under money laundering guidelines.
 - ***Cultural Assimilation.*** *United States v. Lipman*, 133 F.3d 726 (**9th Cir.** 1998), upheld, as a ground for departure, for an illegal reentry defendant, the defendant's "cultural assimilation." The defendant's 23 years of legal residence in the United States (since age 12), his marriage to a United States citizen, and five children who were United States citizens provided significant cultural ties to the United States that made his motivation for illegal reentry or continued presence different from the typical economic motivation. The court noted that it may lessen a defendant's culpability that his motivation is familial or cultural rather than economic.

- ***Defendant's Lost Opportunity to Serve State Sentence Concurrently with Federal Sentence.*** *United States v. Sanchez-Rodriguez*, 161 F.3d 556 (**9th Cir.** 1998) (*en banc*), held that the district court could properly depart based on the fact that, because of the delay in indicting and sentencing the defendant on the federal charge, the defendant lost the opportunity to serve ten months or more of his state sentence concurrently with his federal sentence. The **Ninth Circuit**, sitting en banc, overruled prior circuit precedent to the contrary, *United States v. Huss*, 7 F.3d 1444 (**9th Cir.** 1993), and *United States v. Daggao*, 28 F.3d 985 (**9th Cir.** 1994). The **Ninth Circuit** also found in *Sanchez-Rodriguez* that the district court could properly depart based on the circumstances of the underlying aggravating felony, in this case, a sale of \$20 worth of heroin. The **Ninth Circuit**, sitting en banc, overruled prior circuit precedent to the contrary, *United States v. Rios-Favela*, 118 F.3d 653 (**9th Cir.** 1997).
- ***Defendant's Lack of Knowledge.*** *United States v. Jones*, 158 F.3d 492 (**10th Cir.** 1998), ruled that the fact that the defendant's lack of knowledge that he could not possess a firearm, while subject to a domestic restraining order, was not a valid basis for departure.
- ***Murder-for-Hire Conspiracies.*** *United States v. Scott*, 145 F.3d 878 (**10th Cir.** 1998), upheld a 2-level departure based on the fact that the defendant commenced two separate murder-for-hire conspiracies against a single victim.
- ***Impulse Control Disorder.*** *United States v. Miller*, 146 F.3d 1281 (**11th Cir.** 1998), *cert. denied*, 119 S. Ct. 915 (1999), reversed a departure based on the defendant's impulse control disorder and on the defendant's claim that, despite his conviction, he was not a pedophile. The defendant argued that he used the images of children in barter to get pornographic images he was interested in and that his impulse control disorder contributed to his pornographic interest. The court of appeals rejected the departure on several grounds. First, just because the defendant was not a pedophile, the harm in the offense is sustaining a market for child pornography, of which the defendant was guilty. Second, impulse control disorders are not unusual among those who collect child pornography, so this aspect of the defendant's personality did not separate him from other defendants. Finally, the testimony failed to link the disorder to the offense, so no §5K2.13 departure for diminished capacity was appropriate.
- ***Sentencing Disparity Among Codefendants.*** *United States v. Perkins*, 108 F.3d 512 (**4th Cir.** 1997), reversed a downward departure based on the comparatively lenient treatment given the defendant's similarly situated white codefendants, and the district court's belief that a decreased sentence more accurately reflected the defendant's culpability in the conspiracy. According to the appellate court, the disparity cited by the district court resulted from a proper exercise of prosecutorial discretion in selecting the charges to bring against each codefendant.
- ***Defendant's Concealment of Illegal Activities.*** *United States v. Arce*, 118 F.3d 335 (**5th Cir.** 1997), *cert. denied*, 118 S. Ct. 705 (1998), affirmed an upward departure based on the conduct of a defendant who pleaded guilty to charges involving possession, transfer, and manufacture of illegal weapons. The appellate court found that the upward departure was not an abuse of discretion considering the defendant took affirmative steps to conceal illegal activity a

ownership of illegal firearms and made a videotape to teach others how to make silencers outside of the government's regulatory scheme.

- ***Victim's Lack of Physical or Psychological Harm.*** *United States v. Meacham*, 115 F.3d 1488 (**10th Cir.** 1997), remanded a downward departure based on the lack of significant physical or psychological harm to the victim. According to the appellate court, the sentencing court erred in finding no harm to the victim. The child in this case required numerous therapy sessions and the harm suffered appeared to be typical of offenses involving molestation of children under the age of 12. Further, lack of physical harm is clearly within the heartland of the offense. The court concluded that penetration by any means would have been a sexual act that would constitute criminal sexual abuse and would be covered by USSG §2A3.1.
- ***Absent Threat to Public Safety.*** *United States v. Atkins*, 116 F.3d 1566 (**D.C. Cir.**), *cert. denied*, 118 S. Ct. 430 (1997), reversed a downward departure based on a finding that the defendant was not a threat to public safety. According to the appellate court, the district court abused its discretion in concluding that the defendant was not a threat to public safety because the defendant had not actually injured law enforcement officers despite numerous opportunities. The appellate court found that the defendant had a pattern of violent resistance of arrest, hostage-taking, and armed threats against law enforcement.
- ***Use of Computer in Child Pornography Case.*** *United States v. Delmarle*, 99 F.3d 80 (**2d Cir.** 1996), *cert. denied*, 117 S. Ct. 1097 (1997), affirmed an upward departure based on a finding that the defendant's use of a computer to transmit child pornography over the Internet to minors "to seduce a minor to engage in sexual activity" was outside the heartland of cases covered by the sentencing guidelines.
- ***No Personal Gain from Money Laundering.*** *United States v. Walters*, 87 F.3d 663 (**5th Cir.**), *cert. denied*, 117 S. Ct. 498 (1996), affirmed a downward departure where the defendant received no personal benefit from money laundering. According to the appellate court, because the money laundering guideline makes no mention of failure to receive personal benefit as a mitigating factor, the district court did not abuse its discretion in making the departure.
- ***Deportable Alien Status.*** *United States v. Charry Cubillos*, 91 F.3d 1342 (**9th Cir.** 1996), remanded a downward departure where the departure was based on the increased severity of the defendant's sentence resulting from her status as a deportable alien. According to the appellate court, because this was not a factor mentioned in the guidelines, the district court must make a "refined assessment" of the facts.
- ***Sentence Overrepresented Defendant's Conduct and Culpability.*** *United States v. Goodluck*, 103 F.3d 145 (Table, text in WL), No. 95-2099 (**10th Cir.** Dec. 5, 1996) (unpublished), affirmed a downward departure based on a finding that the sentence exaggerated the defendant's conduct and culpability. According to the appellate court, the evidence revealed

that the defendant was building fires to keep warm and did not possess a clear intent to commit arson.

F. COMBINATION OF FACTORS — §5K2.0, Comment.

- *United States v. Cornielle*, 171 F.3d 748 (**2d Cir.** 1999) affirmed a 1-level downward departure for a combination of the government's four-year delay, pre-indictment delay, and the defendant's post-offense rehabilitation.
- *United States v. Iannone*, 184 F.3d 214 (**3d Cir.** 1999), affirmed an upward departure based on (1) the defendant masqueraded as a decorated Vietnam combat veteran, a person in witness protection program, and a government agent on a secret mission; (2) the defendant's misrepresentation that he had received several combat medals as well as a recommendation for the Congressional Medal of Honor; (3) his attempt to conceal his fraud by faking his own death; (4) his fabricated story about his family having been killed by a drunk driver; and (5) severe psychological harm his fraud caused his victims. The district court noted that it found none of these factors justified departure by itself; but in combination, the factors made the case unusual and justified a 2-level departure.
- *United States v. Reed*, 167 F.3d 984 (**6th Cir.**), *cert. denied*, 120 S. Ct. 229 (1999), reversed a downward departure based in part on the district court's assessment that the defendant's conduct was on the outer edges of that contemplated by the money laundering statutes and in part on the time and cost involved in her interlocutory appeal. Although holding Reed less culpable than the typical money launderer, the district court provided no specifics and offered no factors not contemplated by the guidelines. Further, although delay, costs, and the toll that a delay takes on a defendant certainly may represent legitimate bases for a departure, the court of appeals stated that neither the district judge nor the defendant provided any evidence that the length of the delay or the costs involved in the appeal were unusual; in fact, the defendant remained free on bond during the entire process.
- *United States v. Leahy*, 169 F.3d 433 (**7th Cir.** 1999), upheld the district court's departure from the offense levels specified in §2K2.1 where that guideline was being used only as the most analogous guideline for the instant offense, and therefore did not consider the type or extent of harm posed by the defendant's conduct. The defendant was convicted under 18 U.S.C. § 175 for possession of ricin, a highly toxic substance; there is no guideline promulgated to cover this statute. The court of appeals expressed "doubt that a case in which a district court is required to apply the most 'analogous' guideline pursuant to USSG §2X5.1 can ever be found to fall within the 'heartland' of that guideline. Instead, we believe such a case is, by definition, an 'unusual case' and, therefore, a suitable candidate for either an upward or downward departure." The factors relied upon by the district court were: (1) the maximum penalty for possession of a toxin under 18 U.S.C. § 175(a) is life whereas the maximum penalty for possession of a destructive device (covered by §2K2.1) is only ten years; (2) the number of toxins possessed by Leahy (two); (3) the high toxicity of ricin and other substances in the defendant's possession; and

(4) the potential for mass homicides ricin afforded. In an extensive analysis, the court of appeal noted that several of the factors relied upon by the district court are arguably encouraged bases for upward departure under §§5K2.6 and 5K2.14.

- *United States v. Winters*, 174 F.3d 478 (**5th Cir.**), *cert. denied*, 120 S. Ct. 409 (1999), reversed a downward departure based on susceptibility to abuse in prison for a state corrections officer convicted of several offenses growing out of his pistol-whipping of a handcuffed prisoner. The officer faced a mandatory 60-month term for the firearm offense, in addition to 108 to 135 months on his civil rights and obstruction of justice convictions. The district court's original basis for departure, "aberrant behavior," was rejected by the **Fifth Circuit**. The district court then departed downward on the grounds that his status as an officer made him especially susceptible to abuse in prison and that the guidelines sentence, which included a mandatory minimum term for the use of a firearm, was too harsh. Once again, the **Fifth Circuit** reversed the downward departures. No departure was warranted for the defendant's susceptibility to abuse in prison based on his status as a correctional officer. There was no evidence in this case that the defendant was the subject of widespread publicity like the defendants in the *Koon* case. No other factors existed that made the defendant more susceptible to abuse in prison than any other convicted corrections officer. The idea that a mandatory minimum sentence can make a defendant's other convictions too harsh has already been rejected by the **Fifth Circuit** in *United States v. Caldwell*, 985 F.2d 763 (**5th Cir.** 1993). Accordingly, because the district court articulated no adequate departure factors and based the departure only on its preference for what the sentence should be, the case was remanded for re-sentencing without the benefit of the departures.
- *United States v. Payton*, 159 F.3d 49 (**2d Cir.** 1998), reversed a downward departure based on a combination of factors: two (lack of positive male role model and history of drug abuse and failed treatment) were invalid bases for departure, and the court was mistaken about a third reason, the defendant's ineligibility for credit for his pre-trial detention (defendant did receive credit). The sentencing court had stated that a fourth factor, the defendant's learning disability and loss of educational opportunities, was inadequate, standing alone, to support a departure.
- *United States v. Drew*, 131 F.3d 1269 (**8th Cir.** 1997), reversed a downward departure for a defendant convicted of receiving child pornography based on the defendant's high intelligence, disruption of education (in doctoral program in chemistry), employment consequences (he would not be able to work in law enforcement, as planned), and susceptibility of abuse in prison (because of his conviction for child pornography). Intelligence was at best an unmentioned factor, for which departure would be highly infrequent; education and employment consequences are discouraged factors, and the defendant was no different from most defendants with regard to these collateral consequences; finally, susceptibility to abuse in prison could be the basis for departure only in extraordinary cases.
- *United States v. Sablan*, 114 F.3d 913 (**9th Cir.** 1997), *cert. denied*, 522 U.S. 1075 (1998), affirmed an upward departure based on significant personal injury and property damage. The

appellate court concluded that the extent of the sentencing court's departure from the applicable guideline range was not an abuse of discretion where the court expressly relied on such approved grounds for departure as the nature of the injuries to the victims and significant property damage to a United States Post Office.

- *United States v. Gallegos*, 129 F.3d 1140 (**10th Cir.** 1997), reversed a departure based on a combination of disparity in sentences between the defendant and her codefendants, the defendant's minor role, coercion, lack of criminal history, and family responsibilities. A departure for disparity is not justified when the disparity arises from a plea bargain; the minor role was adequately accounted for by a §3B1.2 reduction; there was no evidence of coercion; a criminal history category of I accounted for the defendant's lack of criminal history; and the defendant's family responsibilities were not extraordinary.
- *United States v. Collins*, 122 F.3d 1297 (**10th Cir.** 1997), affirmed a downward departure from the career offender enhancement based on the defendant's age, ill health, and a remote previous conviction that resulted in a relatively lenient sentence. According to the appellate court, the sentencing court did not rely on any impermissible departure factors. The defendant was 64 at the time of sentencing and when released would be nearly 70 years old. The appellate court concluded that in light of the defendant's age and well documented infirmities, the district court was within its discretion in concluding that the defendant was less likely to recidivate than the ordinary defendant categorized as a career offender.
- *United States v. Johnson*, 152 F.3d 553 (**6th Cir.** 1998), reversed an upward departure based on the defendant's setting fire to an automobile at the entrance of a church under the heating and cooling unit, thereby endangering the firefighters who had to use this entrance. This factor was invalid because there were other entrances to the church and the circumstances of the fire were well within the heartland of cases. Nor were the defendant's racist motives in setting the fire proper bases for departure since they were already accounted for by an enhancement under §3A1.1(a).
- *United States v. Rioux*, 97 F.3d 648 (**2d Cir.** 1996), affirmed a downward departure based on the defendant's physical impairment (diseased kidney) and his charitable works, although neither factor would have been sufficient alone to warrant departure.
- *United States v. Rybicki*, 96 F.3d 754 (**4th Cir.** 1996), reversed a downward departure based on the defendant's alcohol problem, 20 years of military service, offense conduct not deemed a "serious fraud," susceptibility to abuse in prison because the defendant was a law enforcement officer, and problems associated with the defendant's status as a convicted felon. According to the appellate court, "none of the six factors underlying the district court's decision justified a departure from the applicable guideline range."

IV. EXTENT OF DEPARTURES

18 U.S.C. § 3742(f)

If the reviewing court concludes that the decision to depart was not the result of an erroneous interpretation of the guidelines, it must then determine whether the resulting sentence outside the guideline range is unreasonable. If the court does not find the extent of the departure unreasonable, it must affirm the sentence.

Guidelines

The guidelines contemplate two kinds of departures, guided and unguided. In the first, the guidelines provide policy guidance for departure by analogy or by suggestions. *See* USSG Ch. 1, Pt. A(4). The Commission has stated its view that most departures will reflect the suggestions and that the courts of appeal will be more likely to find departures unreasonable where they fall outside suggested levels. *Id.* Unguided departures may be for grounds mentioned in Chapter Five, Part K, or on grounds not mentioned in the guidelines.

Departures driven by considerations of criminal history categories are frequently referred to as horizontal departures, because they move along the horizontal axis of the Sentencing Table. Similarly, departures to higher or lower offense levels are referred to as vertical departures.

Prior to *Koon*, the **Ninth Circuit** required that the extent of an upward departure requires a comparison to analogous guideline provisions. *United States v. Lira-Barraza*, 941 F.2d 745 (**9th Cir.** 1991) (*en banc*). In *United States v. Sablan*, 114 F.3d 913 (**9th Cir.** 1997), *cert. denied*, 118 S. Ct. 851 (1998), however, the court stated its belief that the unitary abuse of discretion standard announced for analyzing the propriety of departures in *Koon* applies equally to an analysis of the extent of departures. The court rejected the analogous approach as “mechanistic” and held that where a district court sets out findings justifying the magnitude of its decision to depart and the extent of departure from the guidelines and that explanation cannot be said to be unreasonable, the sentence imposed must be affirmed. 114 F.3d at 919. However, the court added that the district courts are not prohibited from considering the possible relevancy of analogous guidelines. An analysis and explanation by analogy may still be useful in determining and explaining the extent of departure, but is no longer essential. 114 F.3d at 919 n.10.

For example, in *United States v. Matthews*, 120 F.3d 185 (**9th Cir.** 1997), the district court made an upward departure in sentencing a defendant who placed a bomb that injured a third party, based on the substantial risk of death or serious injury to more than one person. The **Ninth Circuit** found the extent of the departure unreasonable, in that it exceeded the sentence the defendant could have received had he been convicted of the offenses the district court analogized to in order to set the departure. Where a guideline is used by analogy as approximating the defendant’s conduct, the reasonableness of the departure is evaluated by treating the aggravating factor as a separate crime and asking how the defendant would be treated if convicted of it.

In *United States v. Roston*, 168 F.3d 377 (**9th Cir.**), *cert. denied*, 1999 WL 386634 (Oct. 4, 1999), the **Ninth Circuit** approved a 7-level upward departure for extreme conduct where the defendant was convicted of second-degree murder for killing his wife on their honeymoon. The court noted that, although such a departure is substantial, the district court was well-positioned to determine the facts of this case were unusually cruel or brutal, as compared to other second-degree murder cases. “It is appropriate to defer to the district court’s assessment in this case.” Following *Sablan*, the court emphasized that where a district court sets out findings justifying the magnitude and extent of its departure from the guidelines, and the explanation cannot be said to be unreasonable, the sentence imposed must be affirmed. In this case, the court of appeals held that the resulting 405-month term of incarceration “is not an unreasonable punishment for a man who killed his wife in such a barbaric manner.”

The **Second and Third Circuits**, in pre-*Koon* decisions, indicated that they favor the use of analogous guideline provisions to guide departures. *United States v. Rodriguez*, 968 F.2d 130, 140 (**2d Cir.**), *cert. denied*, 506 U.S. 847 (1992); *United States v. Kikumura*, 918 F.2d 1084, 1113 (**3d Cir.** 1990). Post-*Koon*, the **Third Circuit** has adhered to the analogical approach dictated by *Kikumura*. In *United States v. Jacobs*, 167 F.3d 792 (**3d Cir.** 1999), the court remanded a 5-level upward departure under §5K2.3 for “extreme psychological injury” because the district court should have specifically articulated the reasons for the degree of the departure. The district court did not engage in the analogical reasoning required under *Kikumura* in arriving at a 5-level departure, as opposed to some other numerical level of departure. Also post-*Koon*, the **Second Circuit** has signaled its continuing approval of the analogical method. In *United States v. Adelman*, 168 F.3d 84 (**2d Cir.** 1999), approved the use of analogizing to the grouping principles as an appropriate basis for determining the extent of its upward departure for threats to people other than the direct victim. The district court created hypothetical counts for each of the multiple victims of the defendant’s threats, then, because counts involving different victims are not grouped under §3D1.1, the court calculated a 4-level increase in the defendant’s offense level. The court of appeals held that the grouping methodology was not an abuse of discretion.

Also in a pre-*Koon* decision, the **Seventh Circuit** approved using analogies and also treating a §5K2.0 aggravating factor as a separate crime, asking how the defendant would be treated if convicted of it. *United States v. Ferra*, 900 F.2d 1057, 1062-63 (**7th Cir.** 1990). The Seventh Circuit does not read *Koon* as altering its reviewing authority over the magnitude of a departure chosen by the district court. According to that appellate court, although *Koon* changed the standard of review with respect to whether to depart at all, it did not change the circuit’s rationale for requiring a district court to explain reasons for assigning a departure of a particular magnitude in a manner that is susceptible to rational review. *United States v. Horton*, 98 F.3d 313 (**7th Cir.** 1996). In *United States v. Krilich*, 159 F.3d 1020 (**7th Cir.** 1998), for example, the court reversed a 7-level downward departure based on the district court’s statement that the offense level in §2F1.1 overstated the seriousness of the defendant’s conduct; the court of appeals held that the district court’s reasoning was inadequate to support such a departure.

The **Seventh Circuit** rejected a 10-level upward departure in *United States v. Leahy*, 169 F.3d 433 (7th Cir. 1999), stating, “While this Court has approved of looking to an analogous sentencing guideline in measuring the extent of a departure, we must be mindful that the analogy select is an appropriate one.” The court of appeals held that the facts of the case did not warrant the district court’s analogy to the terrorism guideline, since the defendant did not attempt to influence or affect the conduct of the government and had at most threatened to use the toxins he had developed against various family members and friends. The court found it significant, in looking at other guidelines, that defendant could have attempted to use the toxin, even causing significant injury to a victim, and potentially have received a less severe sentence than that which the district court imposed for his conduct in merely possessing a toxin. The court of appeals held that a departure logically should not exceed the level the defendant could have received had he actually committed a more serious offense.

The **Tenth Circuit** has held that, in departing from the applicable guideline range, a district court “must specifically articulate reasons for the degree of departure.” *United States v. Yates*, 22 F.3d 981, 990 (10th Cir. 1994). The district court “may use any ‘reasonable methodology hitched to the sentencing guidelines to justify the reasonableness of the departure,’” including using extrapolation from or analogy to the guidelines. *United States v. Jackson*, 921 F.2d 985, 989-990 (10th Cir. 1990). The **Tenth Circuit** has indicated a view that the *Koon* decision does not affect the analysis of the degree of departure. *United States v. Collins*, 122 F.3d 1296 (10th Cir. 1997). Post-*Koon*, the court has reaffirmed that, while the district court is not required to justify its degree of departure from the guidelines with mathematical exactitude, its justification must include some method of analogy, extrapolation, or reference to the guidelines. *United States v. Whiteskunk*, 162 F.3d 1244 (10th Cir. 1998).

The **First Circuit** requires that the court provide a “reasoned justification for its decision to depart” so long as that statement “constitutes an adequate summary from which an appellate tribunal can gauge the reasonableness of the departure’s extent, [the court] has no obligation to go further and attempt to quantify the impact of each incremental factor on the departure sentence.” *United States v. Emery*, 991 F.2d 907, 913 (1st Cir. 1993). No post-*Koon* decision yet indicates the **First Circuit’s** view as to whether the *Koon* affected the analysis of the degree of departure. In *United States v. Brennick*, 134 F.3d 10 (1st Cir. 1998), the court vacated a downward departure because the monetary loss in the case overstated the gravity of the offense for failing to truthfully account for and pay employment withholding taxes. The court concluded that there was no intent to defraud and, therefore, monetary loss was not a proper measure of culpability. The court of appeals noted that the defendant’s intention to repay may remove his case from the heartland of tax evasion, but questioned the appropriateness of the district court’s borrowing from the fraud guidelines the concept of monetary loss in overstating culpability. In remanding, the court expressed doubt that the extent of the departure, from a range of 41-51 months to 13 months, was justified, but declined to state a downward limit, noting that the district court should fully consider three factors weighing against the departure: indications that the defendant may not have intended to repay the entire amount; the defendant’s false statements that amounts due to the government had been paid; and the crime of structuring.

Similarly, the **Sixth Circuit** has not outlined its view of whether Koon affects the standards for reviewing the extent of a departure. In *United States v. Crouse*, 145 F.3d 786 (**6th Cir.** 1998), the court held that the court should be guided by the structure of the guidelines in its determination of the scope of a departure. The district court in this case had made no reference to the guidelines in determining the extent of the downward departure; the court instead had determined the result—no jail time—and departed downward to a level that would allow this result. Such a methodology is an abuse of discretion.

V. NOTICE REQUIREMENTS

Sentencing Reform Act's Procedural Amendments

The same Sentencing Reform Act of 1984 that initiated the guidelines system also made procedural reforms to achieve the congressional goals of “certainty and fairness” in sentencing. Because a court’s resolution of disputed sentencing factors will usually have a measurable effect on the applicable punishment, more formality was thought to be necessary in determining such issues. Federal Rule of Criminal Procedure 32 was amended to provide for adversarial development of the factual and legal issues relevant to determining the appropriate guidelines sentence. The amended rule directs the probation officer to prepare a presentence report addressing all matters germane to the sentence and requires that the report be disclosed to the parties in order that they may file responses or objections with the court. Rule 32 mandates that the parties be afforded “an opportunity to comment upon the probation officer’s determination and on other matters relating to the appropriate sentence.” Fed. R. Crim. P. 32(a)(1).

Burns v. United States

In *Burns v. United States*, 501 U.S. 129 (1991), the U.S. Supreme Court reasoned that the right to be heard on an issue is rendered meaningless unless one is informed that a decision on the issue is contemplated. The Court held that before a district court can depart upward from the applicable guideline range on a ground not identified as a ground for such departure either in the presentence report or in a prehearing submission by the Government, Rule 32 requires that the court give the parties reasonable notice that it is contemplating such a ruling, specifically identifying the ground for the departure.

The *Burns* requirement has been incorporated into the guidelines as a policy statement: “When any factor important to the sentencing determination is reasonably in dispute, the parties shall be given adequate opportunity to present information to the court regarding that factor.” USSG §6A1.3(a).

The circuit courts have further refined the concept of what notice is required by Rule 32:

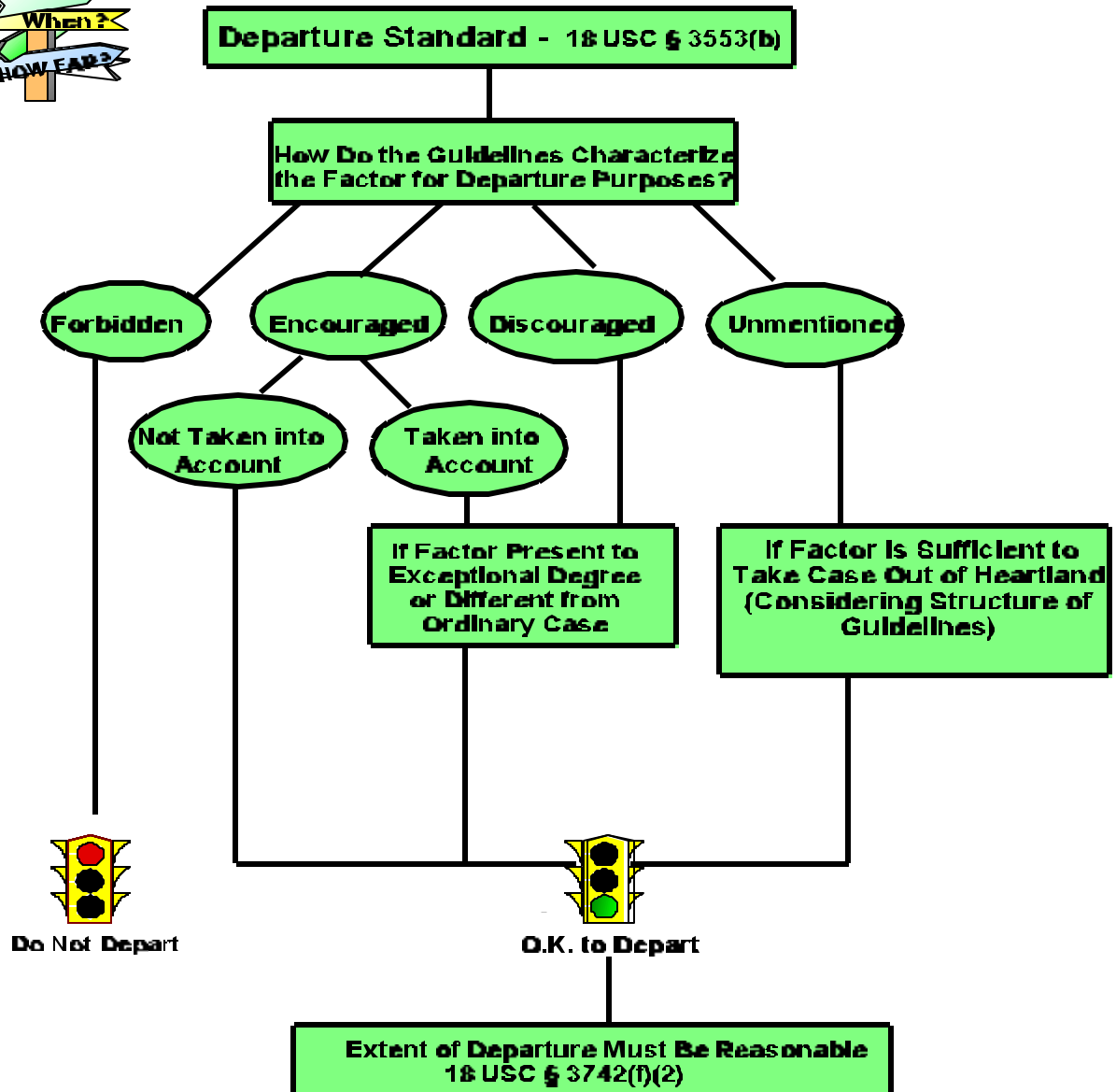
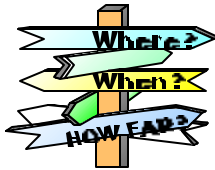
- *United States v. Canada*, 960 F.2d 263 (**1st Cir.** 1992), found that the *Burns* notice requirements do not apply to upward adjustments to the offense level pursuant to Chapter Three, at least when the basis of the adjustment is known.

Several courts have held that the *Burns* notice requirements do not apply to deviations from the nonbinding policy statements found in Chapter Seven of the Guidelines Manual. *United States v. Burdick*, 100 F.3d 882, 885 (**10th Cir.** 1996), *cert. denied*, 117 S. Ct. 1283 (1997); *United States v. Hofierka*, 83 F.3d 357, 362 (**11th Cir.** 1996), *modified*, 92 F.3d 1108 (**11th Cir.** 1996), *cert. denied*, 117 S. Ct. 717 (1997); *United States v. Mathena*, 23 F.3d 87, 93 n.13 (**5th Cir.** 1994); *United States v. Pelensky*, 129 F.3d 63, 70 (**2d Cir.** 1997).

- *United States v. Dolloph*, 75 F.3d 35 (**1st Cir.** 1996), *cert. denied*, 116 S. Ct. 1866 (1996), upheld an upward departure where the court did not give notice of two of the grounds for departure stated by the court, but the extent of the departure was fully justified by the ground of which the defendant had notice and there was “no realistic possibility” of a different result on remand.
- *United States v. Gabriel*, 125 F.3d 89, 106 (**2d Cir.** 1997), applied the *Burns* notice requirement to departures from the guideline fine range.
- *United States v. Lopreato*, 83 F.3d 571 (**2d Cir.** 1996), *cert. denied*, 117 S. Ct. 187 (1996), upheld an upward departure, stating that, even if notice of the court’s intent to depart was not sufficient under *Burns*, the error was harmless beyond a reasonable doubt because the argument the defendant would have made against the departure was explicitly taken into account by the sentencing court.
- *United States v. Pankhurst*, 118 F.3d 345 (**5th Cir.**), *cert. denied*, 118 S. Ct. 630 (1997), reversed a downward departure when the district court cited grounds not previously noticed; the court held that Fed. R. Crim. P. 32 provides that the government also is entitled to notice of the court’s intent to depart. *See, also, United States v. Andruska*, 964 F.2d 640, 644 (**7th Cir.** 1992).
- *United States v. Johnson*, 121 F.3d 1141 (**8th Cir.** 1997), vacated and remanded an upward departure under §5K2.8 based on the cruel and brutal nature of the offense when the presentence report stated explicitly that there were no factors to warrant departure and the possibility of departure was not brought up until just before the court pronounced the sentence.

VI. Departure Analysis Roadmap

DEPARTURE ROADMAP



ADDITIONAL KEY POINTS

- Court must specify reasons for departure and extent of departure
- If choosing not to depart, court should make clear its decision is an informed, discretionary one